Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(1) NATURE OF BOUNDARIES/901. Definition of a boundary.

BOUNDARIES (

1. DELIMITATION OF BOUNDARIES

(1) NATURE OF BOUNDARIES

901. Definition of a boundary.

A boundary is an imaginary line[1] which marks the confines or line of division of two contiguous parcels of land[2]. The term is also used to denote the physical objects by reference to which the line of division is described as well as the line of division itself. In this sense boundaries may be classified as natural or artificial, according to whether or not such physical objects are man-made[3].

Boundaries are fixed: (1) by proved acts of the respective owners[4]; or (2) by statutes or by orders of the authorities having jurisdiction[5]; or (3) in the absence of such acts, statutes or orders, by legal presumption[6].

1 *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55 at 65; *Wishart v Wyllie* (1853) 1 Macq 389, HL.

2 An ancient market may exist without metes and bounds: *Stepney Corpn v Gingell, Son and Foskett Ltd* [1909] AC 245, HL.

3 See *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1339, HL. Natural or artificial objects that may form or locate boundaries include: waters (*Scratton v Brown* (1825) 4 B & C 485; *Bickett v Morris* (1866) LR 1 Sc & Div 47; *Holford v Bailey* (1849) 13 QB 426); the seashore (*A-G v Chambers* (1854) 4 De GM & G 206; *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620); faults intersecting mines where the property consists of a mine (*Davis v Shepherd* (1866) 1 Ch App 410); fences (Woolrych *The Law of Party Walls and Fences* p 281); party walls (*Matts v Hawkins* (1813) 5 Taunt 20; *Cubitt v Porter* (1828) 8 B & C 257). See also paras 916-926 post.

4 See para 903 et seq post.

5 See para 912 et seq post. In the Building Regulations 1972, SI 1972/317 (revoked) and the Building Regulations 1976, SI 1976/1676 (revoked), 'boundary' was specially defined so that in relation to a building the term meant the boundary of the land belonging to the building and such land was deemed to include any abutting part of any street, canal or river, but only up to the centre line thereof. More recent legislation, however, has imposed less detailed control and has not contained such a definition: see the Building Regulations 1991, SI 1991/2768 (revoked); the Building Regulations 2000, SI 2000/2531 (as amended); and BUILDING.

6 See para 916 et seq post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(1) NATURE OF BOUNDARIES/902. Boundaries, horizontal and vertical.

902. Boundaries, horizontal and vertical.

Ordinarily, land is divided either horizontally[1] or vertically, but the division may be made in any other way[2]. Where the division is vertical, the imaginary line of division extends up to the sky, so that the surface carries with it the superincumbent column of air[3], and down to the centre of the earth[4], unless the minerals or other strata have been severed[5], on the principle *cujus est solum, ejus est usque ad coelum et ad inferos*[6].

In the case of a lease or conveyance of a building or flat forming part of a building, the external walls enclosing the property demised will be included[7] and a part of any internal partition wall[8] unless there is provision to the contrary[9]. Where a lease of a top floor flat expressly includes the roof and roofspace, the demise will include the airspace above the roof[10] and may also include the roofspace horizontally adjacent to such a flat unless expressly excluded[11]. Where a flat is demised by reference to a floor of a building, the demise will normally include all the vertical space up to the bottom of the floor above[12].

1 Eg flats and maisonettes, or where the surface and minerals are separately owned. As to the severance of minerals see eg *Rowbotham v Wilson* (1860) 8 HL Cas 348; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 20 et seq.

2 See the Law of Property Act 1925 s 205(1)(ix) (as amended); the Trustee Act 1925 s 12(2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) paras 76-77.

3 *Corbett v Hill* (1870) LR 9 Eq 671; *Wandsworth Board of Works v United Telephone Co* (1884) 13 QBD 904 at 919, CA, per Bowen LJ; *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343; *Ward v Gold* (1969) 211 EG 155; *Straudley Investments Ltd v Barpress Ltd* [1987] 1 EGLR 69, CA (landlord could not construct fire escapes on and above roof of property demised). For further consideration of the proposition and of the Civil Aviation Act 1982 s 76, which restricts action in trespass in respect of the flight of aircraft over land, see *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902 (use of airspace for aerial photography).

4 *Duke of Devonshire v Pattinson* (1887) 20 QBD 263 at 273, CA, per Fry LJ; *Corbett v Hill* (1870) LR 9 Eq 671.

5 See note 1 supra.

6 Ie he who possesses land possesses also that which is above it and below it. See *Solomon v Vintners' Co* (1859) 4 H & N 585 at 600 per Pollock CB. This principle, however, will not exclude from the premises the foundations and eaves of the building extending beyond the surface boundary line: *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA; cf *Laybourn v Gridley* [1892] 2 Ch 53 (part of a loft room protruding into the property conveyed above ground level was included in the conveyance). It will operate to include a cellar beneath the property even where the only access at the time of the conveyance is from adjoining retained property: *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA. Certain minerals are excluded from private ownership (eg petroleum: see the Petroleum Act 1998 s 2; and FUEL AND ENERGY vol 19(3) (2007 Reissue) para 1634). See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 20.

7 *Carlisle Café Co and Todd v Muse Bros & Co* (1897) 67 LJCh 53; *Hope Bros Ltd v Cowan* [1913] 2 Ch 312; *Goldfoot v Welch* [1914] 1 Ch 213; *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA.

8 *Hope Bros Ltd v Cowan* [1913] 2 Ch 312 at 316 ('the demise of a room must necessarily include, unless it be excepted, some part of the wall which bounds it'); *Phelps v City of London Corpn* [1916] 2 Ch 255 at 263.

9 Eg *Cockburn v Smith* [1924] 2 KB 119, CA (lease of 'all that suite of rooms' where the flat was the top floor of a building did not include the roof of the building so the roof and guttering remained in the landlord's possession and control). See also *Douglas-Scott v Scorgie* [1984] 1 All ER 1086, [1984] 1 WLR 716, CA; *Tennant Radiant Heat Ltd v Warrington Development Corpn* [1988] 1 EGLR 41, CA (lease of one small unit in large single storey block included the portion of the roof above because of references in the tenant's covenants).

10 *Davies v Yadegar* [1990] 1 EGLR 71, CA (alteration by tenant involving altering profile of roof was not a trespass). Cf *Tideway Investments and Property Holdings Ltd v Wellwood* [1952] Ch 791, [1952] 2 All ER 514, CA (proposed erection of flue pipes at side of flat protruding into the landlord's airspace and attached to balconies retained by the landlord was a trespass).

11 *Hatfield v Moss* [1988] 2 EGLR 58, CA (demise of a top floor flat which included the main roof was also held to include the adjacent roof space notwithstanding a plan, attached for the purposes of identification only, which appeared to exclude it). See also paras 904, 907 post.

12 *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA; *Graystone Property Investments Ltd v Margulies* (1983) 47 P & CR 472, CA (demise therefore included roof voids above the false ceiling and below the flat above).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/(i) By Agreement/903. Mere agreement sufficient.

(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES

(i) By Agreement

903. Mere agreement sufficient.

Boundaries may be fixed by an agreement[1] made between two or more adjacent owners where their boundaries are not clearly defined or have become lost or confused. In general, such an agreement need not be in writing[2] and, a fortiori, need not be by deed; for, if it was fairly made, it will be presumed that it did not involve any alienation of land but that the boundaries settled were the true and ancient limits[3]. Even where a conveyance apparently conveys a disputed strip of land to one adjoining owner, the erection of a fence or wall by that owner leaving the disputed strip accessible only to the other adjoining owner may be evidence of an express or implied agreement that the boundary is to be represented by that fence or wall[4]. Moreover, the settlement of boundaries is a mutual consideration sufficient to support a contract not made by deed, even where the land is situated out of the jurisdiction[5].

Where, prior to the contract for the sale of land, the boundary was marked out on the land itself and agreed to by the parties the court may have regard to this as part of the 'surrounding circumstances' in construing vague parcels in the subsequent conveyance[6]. However, where a conveyance clearly shows the line of the boundary, the existence of a wall parallel to the boundary is not sufficient to form a basis for a boundary agreement and extrinsic evidence as to where the parties intended the boundary to be is not admissible[7].

1 As to questions of misdescription of boundaries in agreements for the sale of land see *King v Wilson* (1843) 6 Beav 124; and SALE OF LAND vol 42 (Reissue) para 250. As to the remedy of rectification for misdescription of boundaries in conveyances or transfers see *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18, CA; and para 907 post.

2 *Burns v Morton* [1999] 3 All ER 646, [2000] 1 WLR 347, CA (where it was held that there had been an implied oral agreement between the adjoining owners that a new wall should demarcate the boundary between the properties). For a Scottish case where the mutual boundary was adjusted by verbal agreement between the owners see *Hetherington v Galt* (1905) 7 F 706, Ct of Sess.

3 *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 448; *Taylor v Parry* (1840) 1 Man & G 604; *Neilson v Poole* (1969) 20 P & CR 909. Such an agreement, therefore, does not constitute either: (1) a contract for the sale or other disposition of an interest in land required, prior to 27 September 1989, to be evidenced in writing under the Law of Property Act 1925 s 40 (repealed) or, since that date, to be made in writing under the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 145; SALE OF LAND vol 42 (Reissue) para 29); or (2) a conveyance of land, since the Law of Property Act 1925 s 52 (as amended) requires a conveyance of a legal estate to be made by deed (see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 14). Nor is such an agreement registrable as an estate contract (ie as a Class C land charge under the Land Charges Act 1972 s 2(4)(iv): see LAND CHARGES vol 26 (2004 Reissue) paras 628, 632): *Neilson v Poole* supra.

4 See *Stephenson v Johnson* [2000] EGCS 92, CA (the boundary was unclear, but the fence that was erected by one party was approved by the other party's surveyor; it was held that a boundary agreement could be inferred from the parties' conduct); *Burns v Morton* [1999] 3 All ER 646, [2000] 1 WLR 347, CA (the erection of a

wall by the defendant on his own land a few inches away from and in substitution for a fence on the boundary between the properties enabled the court to hold that, since the conveyances declared that any dividing wall was to be a party wall, there was an implied oral agreement that the new wall should demarcate the boundary between the two properties even though the agreement to a small degree altered the boundary from where it had previously been).

5 *Penn v Lord Baltimore* (1750) 1 Ves Sen 444. Cf *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, CA; revsd on a question of construction, sub nom *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, HL.

6 *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635, applying *Webb v Nightingale* (1957) 169 EG 330, CA. These authorities establish that a boundary on a plan which is expressed to be for the purposes of identification only can be overridden in favour of a boundary pegged out on the land by an agreement between the parties beforehand; but this approach did not operate to exclude a plaintiff's right of way over an unmarked grass verge later conveyed to a defendant who fenced it off: *Scott v Martin* [1987] 2 All ER 813 at 818, [1987] 1 WLR 841 at 848, CA, per Nourse LJ. As to the admissibility of evidence of 'surrounding circumstances' see para 929 post.

7 *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA. See also para 929 post.

UPDATE

903 Mere agreement sufficient

NOTE 3--See *Joyce v Rigolli* [2004] EWCA Civ 79, [2004] All ER (D) 203 (Feb) (where an agreement's principal purpose is to identify a border, even if the agreement results in a small exchange of land there is no requirement for it to be evidenced in writing).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/ (ii) By Assurance/904. Definition in conveyance.

(ii) By Assurance

904. Definition in conveyance.

Boundaries may, and generally should, be fixed by the deed or deeds conveying one or both of the properties concerned[1]. Nevertheless, conveyances of land commonly leave the exact line of existing boundaries undetermined[2]. It is only in comparatively rare cases that the exact line assumes any real significance, and the steps necessary to achieve precision can be time-consuming and expensive, for boundaries cannot be fixed unilaterally unless the adjoining land is also in the ownership of the vendor[3]. Where, however, partition of a property is undertaken, the conveyances or transfers, in order to identify the property to which they relate, should incorporate a plan which is on a scale sufficiently large to represent the property and its boundaries in precise detail[4] and should describe the property conveyed with such particularity and precision that there is no room for doubt about the boundaries of each parcel conveyed[5].

The property may be described in any way sufficient to identify it[6], for example by its name or street number, by its abuttals or relation to known adjacent physical features (for instance a road or river), by its dimensions, by a description of its nature, or by reference to its present or former mode of occupation; and in general may be described either by verbal description alone or by verbal description supplemented by a plan[7]. It is unsafe, in the preparation of a conveyance, to rely exclusively on a plan the lines on which are to be taken as the true description of the boundaries of the property conveyed just as if they were contained in the body of the deed[8], for even a well-drawn plan is accurate only within the limits of the scale adopted[9].

It is common for a verbal description of the parcels to be followed by words incorporating a plan to be referred to 'for the purposes of identification only'. The principal effect of these words, at least where the description is clear, is to confine the use of the plan to ascertaining where the land is situated and to prevent the plan controlling the verbal description of the parcels[10]. The effect is similar to that in registered conveyancing, that is, indicating the general boundaries only[11]. Thus where the conveyance shows that a particular acreage is to be conveyed, but the adoption of a boundary from the plan would leave only a reduced acreage, the boundary on the plan must yield to the acreage indicated by the conveyance[12]. However, when a court is required to decide what property passed under a conveyance, it will have regard to the conveyance as a whole, including any plan which forms part of it and the plan may be looked at to assist in the understanding the description of the parcels[13]. Accordingly, the qualifying words 'for the purpose of identification only' do not prevent the use of the plan to determine a true boundary where this is the sole means which the conveyance affords to indicate where the boundary is intended to be drawn, provided such reference is in order to elucidate problems which are left undecided and does not contradict or control the verbal description in the parcels[14].

Phrases such as 'more particularly delineated' or 'more particularly described' or 'more precisely delineated' used in reference to a plan are words which tend to show that in the case of conflict or uncertainty the plan is to prevail over any verbal description[15].

Where both forms of expression are used together, as in the phrase 'for the purposes of identification only more particularly delineated', they tend to be mutually stultifying[16]. Such language is confusing and inconclusive, and it does not give the plan any predominance over the parcels; in such a case the court must establish the true construction of the conveyance[17].

Where there are no controlling words, but the parcels are described by reference to a plan, the natural inference is that it was the intention of the parties that the plan should show the boundaries of the land which the conveyancing document was purporting to pass[18]. However, the document must be construed in the light of the actual state of the *locus in quo* at the time and what a reasonable layman would think he was purchasing[19].

The construction of a deed is always a matter for the court, but in order to interpret its provisions extrinsic evidence is admissible of all material facts existing at the time of execution of the deed, so that the court may have the same knowledge as the parties to the deed then had[20]. If the terms of the transfer clearly define the land transferred, extrinsic evidence is not admissible to contradict the transfer[21]; but if the terms of the transfer do not clearly define the land or interest transferred, extrinsic evidence is admissible so that the court can arrive at the true meaning of the parties[22]. Once it is admissible, there is no reason to limit the extrinsic evidence to what is found in earlier documents of title without regard to what is found on the site[23].

1 The definition contained in a conveyance prevails in the demarcation of a boundary: *Burns v Morton* [1999] 3 All ER 646, [2000] 1 WLR 347, CA (provision in conveyance that any division walls or fences were to be party walls and that future walls were to straddle the boundary; it was held that a new wall, built by the defendant a few inches inside the fence that previously demarcated the boundary, became the boundary by implied agreement between the adjoining owners). See also para 903 ante.

There is a statutory presumption as between vendor and purchaser of the accuracy of recitals, statements and descriptions in deeds more than 20 years old: see the Law of Property Act 1925 s 45(6); and SALE OF LAND vol 42 (Reissue) paras 150, 285.

2 See *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL, where the background to and the reasons for the general boundaries approach in both registered and unregistered conveyancing is discussed. As to boundaries of registered land see para 906 post.

3 For this reason the general conditions of sale of land most commonly used absolve the vendor from having to prove the exact line of the boundaries: see the Standard Conditions of Sale (3rd Edn, 1995) para 4.3.1; and SALE OF LAND vol 42 (Reissue) para 109. As to the Standard Conditions of Sale see SALE OF LAND vol 42 (Reissue) para 1. For the effect of similar conditions see *Curling v Austin* (1862) 2 Drew & Sm 129.

4 *Kingston v Phillips* (22 June 1976) Lexis, Enggen Library, Cases File, CA, per Buckley LJ; applied in *Scarfe v Adams* [1981] 1 All ER 843, CA.

5 *Scarfe v Adams* [1981] 1 All ER 843 at 845, CA, per Cumming-Bruce LJ (where a plan on a scale of 1:2500 was described as 'worse than useless'). See also *Mayer v Hurr* (1983) 49 P & CR 56, CA.

6 *Carlisle Café Co and Todd v Muse Bros & Co* (1897) 67 LJCh 53; *Hope Bros Ltd v Cowan* [1913] 2 Ch 312; *Goldfoot v Welch* [1914] 1 Ch 213.

7 A plan for identification only of an existing property which has been a complete unit for some time with the perimeters fenced off would take second place to the description of such a property in the parcels by its postal address: *Targett and Targett v Ferguson and Diver* (1996) 72 P & CR 106 at 115, CA, per Sir John Balcombe.

In the case of compulsory acquisition of land where the Acquisition of Land Act 1981 applies, the compulsory purchase order must describe by reference to a map the land to which it applies: see the Compulsory Purchase of Land Regulations 1994, SI 1994/2145 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 558 et seq. See further *Protheroe v Tottenham and Forest Gate Rly Co* [1891] 3 Ch 278, CA.

In the case of registered land, an instrument dealing with part of the land comprised in a title is required to be accompanied by a plan showing the land dealt with, unless such part is clearly defined on the filed plan of the land, in which case it may be defined by reference to the filed plan: see the Land Registration Rules 1925, SR & O 1925/1093, r 79 (as amended); and LAND REGISTRATION.

8 *Lyle v Richards* (1866) LR 1 HL 222; *Llewellyn v Earl of Jersey* (1843) 11 M & W 183. As to the right of a purchaser to have a plan to supplement the verbal description in his conveyance see *Re Sharman and Meade's Contract* [1936] Ch 755, [1936] 2 All ER 1547; and SALE OF LAND vol 42 (Reissue) para 148. Where the boundary is the centre of a road or river it is better to say so, or to mark it so on the plan, but, at least in the case of roads, it is not the practice of the Land Registry to do this: see *Russell v Barnet London Borough Council* (1984) 271 EG 699; and paras 906, 920 post. As to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) para 1064.

9 Thus in *Taylor v Parry* (1840) 1 Man & G 604 the plan was on such a small scale that a boundary could not be accurately traced and as the land was sufficiently described in the body of the deed, the plan was not allowed to control the description. See also *Scarfe v Adams* [1981] 1 All ER 843, CA; and notes 4, 5 supra.

10 See *Hopgood v Brown* [1955] 1 All ER 550 at 561, [1955] 1 WLR 213 at 228, CA, per Jenkins LJ; *Neilson v Poole* (1969) 20 P & CR 909; *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 440, [1978] 1 WLR 1462 at 1467, CA, per Buckley LJ; *Hatfield v Moss* [1988] 2 EGLR 58, CA. A plan so referred to does not comply with the Land Registration Rules 1925, SR & O 1925/1093, r 79 (as amended): see Ruoff and Roper *Registered Conveyancing* paragraphs 17.25-17.26, 18.08.

11 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 902, [1999] 1 WLR 894 at 899, HL, per Lord Hoffmann. See further para 906 post.

12 *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 447, [1978] 1 WLR 1462 at 1475, CA, per Bridge LJ; and see *Moreton C Cullimore (Gravels) Ltd v Routledge* (1977) 121 Sol Jo 202, CA. So where a measurement had been inserted into a conveyance by common mistake and the plan showed what had been intended, it was necessary to seek a decree of rectification of the conveyance: *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18, CA.

13 *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 445, [1978] 1 WLR 1462 at 1473, CA, per Buckley LJ.

14 *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 447, [1978] 1 WLR 1462 at 1475, CA, per Bridge LJ (reference to a plan, described as being for the purposes of identification only and clearly linked to a description in a schedule which was by reference to ordnance survey numbers, was the only way to discover what the parties intended to be the boundary); applied in *Scott v Martin* [1987] 2 All ER 813, [1987] 1 WLR 841, CA. See also *Targett and Targett v Ferguson and Diver* (1996) 72 P & CR 106, CA (parcels clause of conveyance of a building plot not explicit enough to identify the boundary and, in the light of the fencing covenants and the 'T' marks, the boundary was declared to be that shown on the plan); *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA (plan clearly identified and delineated the relevant boundary).

15 *Eastwood v Ashton* [1915] AC 900, HL; *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA; *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225; *Kensington Pension Developments Ltd v Royal Garden Hotel (Oddenino's) Ltd* [1990] 2 EGLR 117.

16 *Neilson v Poole* (1969) 20 P & CR 909 at 916 per Megarry J (delineation so described was held to be only for the purpose of showing the identity of the property and so negatived any use of the plan to show precise

boundaries); *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 444, [1978] 1 WLR 1462 at 1472, CA; and see *Moreton C Cullimore (Gravels) Ltd v Routledge* (1977) 121 Sol Jo 202, CA. See also *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA.

17 *Neilson v Poole* (1969) 20 P & CR 909 at 916 per Megarry J; *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL (where it was held that it was unlikely that a vendor would retain a useless strip of land beyond a hedge and including a ditch so the intent was more likely to have been that the plan was for purposes of identification only); *Druce v Druce* (25 April 2002) Lexis, Enggen Library, Cases File, ChD.

18 *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] Ch 287 at 289, [1987] 1 All ER 700 at 706, CA (by a majority, it was held that the coloured edging on a plan attached to a transfer prevailed over a reference to a registered title number).

19 *Toplis v Green* [1992] EGCS 20, CA; *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 902, [1999] 1 WLR 894 at 899, HL, per Lord Hoffmann.

20 *Lord Waterpark v Fennell* (1859) 7 HL Cas 650; *Ward v Gold* (1969) 211 EG 155; *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635; and see para 929 post. As to extrinsic evidence for the interpretation of deeds see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 198 et seq.

21 *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA; *Scarfe v Adams* [1981] 1 All ER 843, CA; *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18, CA; *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA. If such a transfer does not truly express the bargain between the vendor and the purchaser the only remedy available is by way of rectification of the transfer.

22 *Neilson v Poole* (1969) 20 P & CR 909; *Scarfe v Adams* [1981] 1 All ER 843 at 848, CA, per Cumming-Bruce LJ, and at 851 per Griffiths LJ; *Mayer v Hurr* (1983) 49 P & CR 56, CA.

23 *Mayer v Hurr* (1983) 49 P & CR 56, CA.

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NOTE 7--Land Registration Rules 1925, SR & O 1925/1093 lapsed on the repeal of the enabling authority by the Land Registration Act 2002 s 135, Sch 13, replaced by the Land Registration Rules 2003, SI 2003/1417; see LAND REGISTRATION. SI 1994/2145 replaced by the Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004, SI 2004/2595 (amended by SI 2009/1307), and the Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004, SI 2004/2732.

NOTE 10--See *Strachey v Ramage* [2008] EWCA Civ 384, [2008] 2 P & CR 154, [2008] All ER (D) 267 (Apr).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/ (ii) By Assurance/905. Use of ordnance survey maps.

905. Use of ordnance survey maps.

Ordnance survey maps, which are increasingly used as the basis of conveyance plans[1], do not purport to fix private boundaries[2]. Where there are boundary features, such as hedges or fences, between parcels of land, it is the practice of the Ordnance Survey to draw the boundary line down the middle of these features regardless of whether the true boundary lies to one side or the other[3]. If a conveyance of part of an estate is by reference to a plan, not said to be for the purposes of identification only, which has been copied from the ordnance survey map, then the land will be bounded by the centre of the hedge or other boundary feature shown on the

plan for that is where the parties to the conveyance intended it to be[4]. Where, however, there are two plots of land which have never been in common ownership, the fact that a conveyance of one plot identifies the land for the purposes of identification only by reference to an ordnance survey map which shows the boundary to be in the middle of the hedge does not displace the line of the boundary already established by the hedge and ditch presumption[5].

1 Ordnance survey maps are the basis of all registered descriptions of registered land: see para 906 post. Ordnance maps are Crown copyright and may not be reproduced without permission: see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) paras 144-149. In referring to ordnance maps the best course is to refer to the edition number as well as the field number, since these do not always remain the same in different editions. As to the Ordnance Survey see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1110 et seq.

2 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 904, [1999] 1 WLR 894 at 901, HL, per Lord Hope of Craighead. The Ordnance Survey Act 1841, authorising the completion of a general survey of Great Britain, does not extend to ascertaining private boundaries, and private titles remain unaffected by it: see s 12 (as amended); and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1117. As to ordnance survey maps as evidence see para 934 post; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1111. As to the admissibility in evidence of maps and plans generally see para 939 post.

3 *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA; *Davey v Harrow Corpn* [1958] 1 QB 60 at 69, [1957] 2 All ER 305 at 307, CA, per Lord Goddard CJ.

4 *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA; *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL. As to the normal presumption of ownership in the case of hedges and ditches, etc see para 916 et seq post.

5 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL. As to the hedge and ditch presumption see note 4 supra; and para 918 post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/ (ii) By Assurance/906. Registered land.

906. Registered land.

The plans used by the Land Registry for the registration of titles are based on the ordnance survey maps[1] and ordinarily are deemed to show only what are described as the general boundaries[2]. In such cases the exact line of the boundary is left undetermined; for instance, it may be unclear whether it includes a hedge or wall and ditch; or whether it runs along the centre of a wall or fence or its outer or inner face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any part of any adjoining road or stream[3]. The general boundaries rule[4] applies notwithstanding that a part or the whole of a ditch, wall, fence, road, stream or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title[5]. The precise boundary must, if the question arises, be established by topographical and other evidence[6]; and the established legal presumptions[7] may apply to registered land with evidence being given as to the position prior to registration of the title[8].

1 See the Land Registration Act 1925 s 76; the Land Registration Rules 1925, SR & O 1925/1093, r 272; and LAND REGISTRATION. The Land Registry may therefore be expected to follow the practice of the Ordnance Survey as to boundary features, as to which see para 905 ante. As to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) para 1064; and as to the Ordnance Survey see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1110 et seq.

As from a day to be appointed, the Land Registration Act 1925 s 76 is repealed by the Land Registration Act 2002 s 135, Sch 13. The Land Registration Act 2002 provides that the form in which the information included in the register is to be kept will be a matter for rules made under that Act: see s 1(2) (not yet in force). At the date

at which this volume states the law no day had been appointed under s 136(2) for the commencement of the provisions of the Land Registration Act 2002.

2 See the Land Registration Rules 1925, SR & O 1925/1093, r 278(1) (as amended); and LAND REGISTRATION. See also *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL; *Lee v Barrey* [1957] Ch 251, [1957] 1 All ER 191, CA (plan on a land certificate, which was a copy from the filed plan, differed from that attached to the transfer and the plan on the transfer prevailed); *Hesketh v Willis Cruisers Ltd* (1968) 19 P & CR 573, CA; *Pardoe v Pennington* (1996) 75 P & CR 264, CA. As to the procedure whereby land may exceptionally be registered with fixed boundaries see the Land Registration Rules 1925, SR & O 1925/1093, rr 276, 277 (both as amended); para 913 post; and LAND REGISTRATION. Note that the fullest available particulars of the boundaries must be added to the filed plan where physical boundaries or boundary marks do not exist: see r 279 (as amended); and LAND REGISTRATION.

The general boundaries rule will continue under the Land Registration Act 2002: see s 60(1) (not yet in force: see note 1 supra).

3 See the Land Registration Rules 1925, SR & O 1925/1093, r 278(2); and LAND REGISTRATION. As to the legal presumptions applicable to boundary features where there is no express or clear provision see paras 916-926 post.

4 See the text and note 2 supra.

5 See the Land Registration Rules 1925, SR & O 1925/1093, r 278(4); and LAND REGISTRATION. But if a deed or other instrument contains an express declaration or agreement as to the ownership of a particular feature, the owner may apply to the registrar for a note of the declaration or agreement to be entered on the register: see the Land Registration Act 1925 s 76 (prospectively repealed: see note 1 supra); the Land Registration Rules 1925, SR & O 1925/1093, r 281 (as amended); and LAND REGISTRATION.

6 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 900, [1999] 1 WLR 894 at 897, HL, per Lord Hoffmann.

7 See paras 916-926 post.

8 *Hall v Dorling* (1996) 74 P & CR 400, CA. See also *Russell v Barnet London Borough Council* (1984) 271 EG 699 at 701 per Tudor Evans J (presumption that the soil of a highway belonged to the owner of land adjoining the highway not rebutted by plans annexed to the entries in the Land Registry title).

UPDATE

906 Registered land

NOTES 1, 2, 3, 5--Land Registration Rules 1925, SR & O 1925/1093 replaced by Land Registration Rules 2003, SI 2003/1417: see LAND REGISTRATION.

NOTE 1--Day now appointed: SI 2003/1725.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/ (ii) By Assurance/907. Effect of inaccuracy.

907. Effect of inaccuracy.

In a conveyance of land, the land should be described with the utmost accuracy that is practicable; it is the duty of the grantor to see that this is done as the grant will be construed most strongly against him[1], except where the grantor is the Crown[2]. Inaccuracy in a statement of dimensions or in a plan, however, does not vitiate a sufficiently certain description of the land conveyed except where the dimensions are an essential part of the description or definition, and not merely a cumulative description[3].

Where by a mistake common to both parties a piece of land which was not intended to be conveyed is included in the conveyance, relief by rectification can be granted[4]; but if the mistake is unilateral the remedy is rescission, not rectification[5], although the court may give the defendant the option of taking what the claimant meant to give instead of granting to the claimant the remedy of rescission[6]; and where the mistake has arisen from an innocent misrepresentation, damages may be awarded in lieu of rescission[7].

It may be a defence to a claim instituted by the vendor to enforce a contract that the land is wrongly described, and that, as a result, the vendor has title to less than that which the contract describes[8], but if the misdescription was innocent and is not substantial or trifling[9], the vendor is entitled under an open contract[10] to an order for specific performance with, if appropriate, an abatement of the price[11].

A misrepresentation, even if innocent, involving a misdescription of the property, whether as a term of the contract or in the course of negotiations, which induced the purchaser to enter into the contract will be a bar to specific performance and entitle the purchaser to rescind[12].

Where a conveyance of land intended to form a building plot stated the dimensions of three sides but not the fourth, repeating in substantially identical terms the description in earlier conveyances, and a plan, referred to for the purposes of facilitating identification only, showed the fourth boundary as a straight line, the court inferred that the true boundary of the fourth side was a straight line, and the fact that there had been an encroachment on the land, before the conveyance in question but since the description was originally formulated, was not allowed to affect the construction of the deed[13].

1 *Mellor v Walmesley* [1905] 2 Ch 164, CA. As to the admissibility of extrinsic evidence in cases of ambiguously described boundaries see para 929 post. A purchaser of part of land having a common title may, in the case of unregistered land, require notice to be preserved, by indorsement on or annexation to some document retained by the vendor and forming part of the common title, of covenants in the conveyance to him affecting other land comprised in the common title: see the Law of Property Act 1925 s 200; and SALE OF LAND vol 42 (Reissue) para 298.

2 See *A-G v Ewelme Hospital* (1853) 17 Beav 366 at 386; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 179. As to Crown land generally see CROWN PROPERTY.

3 *Mellor v Walmesley* [1905] 2 Ch 164 at 174, CA; *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] Ch 287, [1987] 1 All ER 700, CA; and see *Llewellyn v Earl of Jersey* (1843) 11 M & W 183. As to ambiguity in the description see para 928 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 208-209 post.

4 *Craddock Bros Ltd v Hunt* [1922] 2 Ch 809 at 823 (affd [1923] 2 Ch 136, CA); *USA v Motor Trucks Ltd* [1924] AC 196, HL (specific performance of an agreement as rectified may be ordered); *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18, CA; and see MISTAKE vol 77 (2010) PARA 57 et seq. If rectification is to be sought as a remedy, then it is important that this is fully aired at the first hearing for it will be difficult for an appellate court to have available the convincing proof that rectification requires: see *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA. As to mistake generally see MISTAKE.

5 *Solle v Butcher* [1950] 1 KB 671 at 695, [1949] 2 All ER 1107 at 1121, CA, per Denning LJ; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128; and see MISTAKE vol 77 (2010) PARA 52 et seq. As to rescission of contracts induced by misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 812 et seq. See also the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) paras 704, 817. As to rescission of contracts generally see CONTRACT vol 9(1) (Reissue) para 986 et seq.

6 *Paget v Marshall* (1884) 28 ChD 255. See also *Solle v Butcher* [1950] 1 KB 671 at 696-697, [1949] 2 All ER 1107 at 1122, CA, per Denning LJ; *Re Tottenham* (1868) IR 2 Eq 375 (where property mistakenly included in a conveyance, to the knowledge of the grantee, was ordered to be conveyed by the grantee to a trustee).

7 See the Misrepresentation Act 1967 s 2(2); *Gosling v Anderson* (1972) 122 NLJ 152, CA; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834. Whether or not a representation is innocent, damages may be awarded in a proper case if they have been expressly claimed, eg as an alternative to rescission: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 781. As to damages generally see DAMAGES.

8 See *Flight v Booth* (1834) 1 Bing NC 370; *Mortlock v Buller* (1804) 10 Ves 292 at 315-316; *Scott v Hanson* (1829) 1 Russ & M 128; *Price v Macaulay* (1852) 2 De GM & G 339 at 344; *Clayton v Leech* (1889) 41 ChD 103, CA. See also SALE OF LAND; SPECIFIC PERFORMANCE.

9 *Walker v Boyle* [1982] 1 All ER 634 at 644, [1982] 1 WLR 495 at 506 per Dillon J, who was of the opinion that only a trifling misrepresentation, where the truth would have no effect on the purchaser, would entitle a purchaser to specific performance.

10 The Standard Conditions of Sale (3rd Edn) deal specifically with misleading or inaccurate plans or statements: see condition 7.1; and SALE OF LAND vol 42 (Reissue) para 110. As to the Standard Conditions of Sale see SALE OF LAND vol 42 (Reissue) para 1.

11 *Jacobs v Revell* [1900] 2 Ch 858; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19; *St Pier v Shirley* (1961) 179 EG 837. See further SPECIFIC PERFORMANCE.

12 *Walker v Boyle* [1982] 1 All ER 634 at 644, [1982] 1 WLR 495 at 506 per Dillon J (failure to disclose a boundary dispute entitled a purchaser to rescind). See also *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287. See further MISREPRESENTATION AND FRAUD; SALE OF LAND; SPECIFIC PERFORMANCE.

13 *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA. Cf *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635. See also *Targett and Targett v Ferguson and Diver* (1996) 72 P & CR 106, CA. See further paras 904 ante, 911, 929 post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/ (ii) By Assurance/908. How far boundary included in property bounded.

908. How far boundary included in property bounded.

Whether a boundary is, or is not, included in the property which it is described as bounding depends upon the particular circumstances of each case. Thus in the case of adjoining properties bounded by a hedge and ditch, there is no inaccuracy in describing either property as so bounded, though the boundary may be wholly included in one and excluded from the other[1]. However, where the nature of the object named as a boundary (for example, a house or land) is such that an independent title to it would in the natural course of events be made, the boundary object is excluded from the subject matter of the grant[2].

A demise of part of a building bounded by an external wall includes both sides of the wall enclosing the part demised[3], and a demise bounded by a partition wall includes half or some part of the partition wall[4], unless such construction is expressly or impliedly excluded by the terms of the lease. In modern leases of part of a building it is standard practice for the extent of the property to be defined with considerable exactitude.

1 *Re Belfast Dock Act 1854, ex p Earl of Ranfurly* (1867) IR 1 Eq 128 at 140. As to the presumptions of ownership in the case of hedges, ditches, roads and rivers see paras 916-926 post. As to the practice of the Ordnance Survey and Land Registry in relation to such features see paras 905-906 ante. As to the Ordnance Survey see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1110 et seq; and as to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) para 1064.

2 *Lord v Sydney City Comrs* (1859) 12 Moo PCC 473; and see *City of Boston v Richardson* 13 Allen (Mass) 146 (1866) at 154.

3 *Carlisle Café Co and Todd v Muse Bros & Co* (1897) 67 LJCh 53; *Hope Bros Ltd v Cowan* [1913] 2 Ch 312; *Goldfoot v Welch* [1914] 1 Ch 213; *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA. As to vertical and horizontal boundaries of flats and properties forming parts of buildings see para 902 ante.

4 *Hope Bros Ltd v Cowan* [1913] 2 Ch 312 at 316; *Phelps v City of London Corpn* [1916] 2 Ch 255 at 263.

(iii) By Undisturbed Possession

909. Effect of the Limitation Act 1980.

The right to boundaries fixed by agreement or assurance may be lost, and a new boundary may be acquired under the Limitation Act 1980[1] after undisturbed possession by another of the land falling between the old and the new boundaries for a period of 12 years[2] or, in particular circumstances, for a longer period[3]. In order that the Act may operate, the person claiming a possessory title must show ordinary possession[4] of the land for the requisite period without consent of the owner[5]. In the absence of discontinuance of possession, there will be a dispossession of the paper owner in any case where a squatter assumes possession in the ordinary sense of the word[6]. A claimant, who must have been in adverse possession for the requisite period[7], must show both factual possession of the land and the requisite intention to possess the land[8].

Factual possession requires an appropriate degree of physical control[9]. The intention to possess the land falling between the old and the new boundaries must be an intention made clear and plain to the world by the acts of the claimant[10] for the claimant must not only have the subjective intention to possess the land but also show by outward conduct that it was his intention[11]. Possession on the part of the claimant does not have to be inconsistent with that of the person entitled to the paper title in the land[12]; though a true owner will not be found to have discontinued possession if he intends to use the land for a particular purpose at a future date, he will be dispossessed by a claimant who performs sufficient acts[13] and has sufficient intention to constitute adverse possession[14]. So mere non-user on the part of the owner is not sufficient evidence of discontinuance of possession without acts establishing possession on the part of the person claiming the land[15]; and if the acts alleged are too trivial to amount to the taking of actual possession or if the necessary intention has not been shown, the true owner is not dispossessed[16].

A claim may be made by adverse possession to a boundary wall, even if the claim is to half of a party wall longitudinally divided[17]. If the claim relates to part only of a length of a wall, then there must be a clear and definite division between that part of the wall claimed and that part which the claimant does not claim[18]. Where a house is erected against a wall which belongs to and is situated on the land of the adjoining owner, using that wall to form one side of the house, the passage of time alone will not give the owner of the house a statutory title to the wall[19], though probably he would acquire an easement of support for his roof[20].

Where on a boundary wall an inscription stating that the wall belongs to the adjoining owner is allowed to remain, acquisition of the wall by adverse possession is virtually excluded, and no question of a statutory title, or of adverse possession, or of cesser of possession, can properly arise[21].

1 As to the Limitation Act 1980 see LIMITATION PERIODS. A submission that the principles of adverse possession are the sole or main way to resolve disputes relating to the lines of boundaries and that a court should not strive to find a boundary agreement varying that which has been agreed in a conveyance was not accepted in *Stephenson v Johnson* [2000] EGCS 92, CA. See also para 903 ante.

2 See the Limitation Act 1980 ss 15, 17 (prospectively amended), Sch 1 (as amended); and LIMITATION PERIODS vol 68 (2008) PARAS 1025, 1095. See also *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA; *Marshall v Taylor* [1895] 1 Ch 641, CA; *Norton v London and North Western Rly Co* (1879) 13 ChD 268, CA. Where title is founded on adverse possession the title will normally be limited to the area of which

actual possession has been enjoyed (*Glyn v Howell* [1909] 1 Ch 666); but acts of possession on parts of a defined tract of land may be evidence of possession of the whole (*Higgs v Nassauvian Ltd* [1975] AC 464 at 474, [1975] 1 All ER 95 at 101, PC). Time only ceases to run by a resumption of possession or commencement of an action: *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 3 All ER 129, [1988] 1 WLR 1078, CA. An application to the Land Registry to warn off a caution registered by an adverse possessor is not an action to recover land for the purposes of the Limitation Act 1980 s 15 and so does not prevent time continuing to run: *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676; affd on other grounds [2002] UKHL 30, [2002] 3 All ER 865. See further LIMITATION PERIODS vol 68 (2008) PARA 1025.

3 Eg the period may be longer if the land is held on trust or is settled land and there are future beneficial interests (see the Limitation Act 1980 s 18 (as amended), Sch 1 para 4); or if the owner is under a disability (see s 28 (as amended)); or if the land is held on lease (see *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, HL; *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948).

4 Ie in the sense of entitling a person to maintain an action for trespass: *Powell v McFarlane* (1977) 38 P & CR 452 at 469 per Slade J, applied in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [32], [2002] 3 All ER 865 at [32] per Lord Browne-Wilkinson.

5 *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [36], [2002] 3 All ER 865 at [36] per Lord Browne-Wilkinson. See also *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA.

6 For the distinction between dispossession and discontinuance of possession see *Rains v Buxton* (1880) 14 ChD 537 at 539-540. See also *Kynoch Ltd v Rowlands* [1912] 1 Ch 527, CA; *Treloar v Nute* [1976] 1 WLR 1295 at 1300, CA, per Sir John Pennycuick; *Hounslow London Borough Council v Minchinton* (1997) 74 P & CR 221, CA (the continuing presence of a hedgerow, shrubs and trees planted on a strip of land later fenced off by the paper owner is not sufficient to maintain possession of the land against the adjoining owner who takes adverse possession).

7 See the Limitation Act 1980 Sch 1 para 8(1) (which gives statutory authority to the rules previously laid down by the courts); and LIMITATION PERIODS vol 68 (2008) PARAS 1034, 1078. The statutory definition of adverse possession means land in possession of a person in whose favour time can run, and is directed not to the nature of the possession but to the capacity of the squatter: *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [35], [2002] 3 All ER 865 at [35]. See also *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA; *Philpot v Bath* (1904) 20 TLR 589 (affd (1905) 21 TLR 634, CA); *Marshall v Robertson* (1905) 50 Sol Jo 75; *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804; *Sze To Chun Keung v Kung Kwok Wai David* [1997] 1 WLR 1232, PC.

8 *Powell v McFarlane* (1977) 38 P & CR 452 at 470 per Slade J, applied in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [40], [2002] 3 All ER 865 at [40] per Lord Browne-Wilkinson. See also *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA. See notes 13, 14 infra.

9 *Powell v McFarlane* (1977) 38 P & CR 452 at 470-471 per Slade J, applied in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [41], [2002] 3 All ER 865 at [41] per Lord Browne-Wilkinson. See also note 13 infra.

10 *Powell v McFarlane* (1977) 38 P & CR 452 at 472 per Slade J; *Wilson v Martin's Executors* [1993] 1 EGLR 178, CA; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, CA.

11 *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87, CA, per Peter Gibson LJ. See also *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [76], [2002] 3 All ER 865 at [76] per Lord Hutton (where the evidence establishes that the person claiming title has used it in the way in which an owner would, then in a normal case he will not have to adduce additional evidence to establish the intention to possess).

12 See the Limitation Act 1980 Sch 1 para 8(4); and LIMITATION PERIODS vol 68 (2008) PARA 1078. This provision abrogates the decision in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94, [1974] 3 All ER 575, CA (where an adverse possessor, whose use was not inconsistent with the present or future owner's enjoyment of the land was said to have an implied licence from the true owner). Further, the alleged 'special rule' at common law that where land is acquired or retained by the owner for specific future purposes then acts of trespass which are not inconsistent with such purpose do not amount to dispossession, based on a dictum of Bramwell LJ in *Leigh v Jack* (1879) 5 ExD 264 at 273, CA, was held not to have survived the enactment of the Limitation Act 1980 Sch 1 para 8(4) and to have been erroneous prior to that Act: *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA (approving the dissenting judgment of Stamp LJ in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* supra at 109-110 and 585, and the judgment of Slade J in *Powell v McFarlane* (1977) 38 P & CR 452). See also *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865.

13 Factual possession signifies an appropriate degree of physical control, a single and exclusive possession measured by an objective standard: *Powell v McFarlane* (1977) 38 P & CR 452 at 470-471 per Slade J (pasturing a cow and exercising shooting rights were equivocal). Enclosure of the land is the strongest possible evidence

of adverse possession: *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA (cultivating a plot as a part of a garden and putting a padlock on a gate in a fence erected by the true owner). The ploughing and cultivation of agricultural land has been held to suffice: *Seddon v Smith* (1877) 36 LT 168, CA; *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865. Note, however, *West Bank Estates Ltd v Arthur* [1967] 1 AC 665, [1966] 3 WLR 750, PC (cutting of timber and grass did not amount to adverse possession); *Wilson v Martin's Executors* [1993] 1 EGLR 178, CA (repairing a fence and cutting trees and taking fallen timber were insufficient acts to constitute adverse possession of a piece of woodland). Receipt of rent will constitute adverse possession even if the true owner is in possession: *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804. Parking of cars may be evidence of possession: *Williams v Usherwood* (1981) 45 P & CR 235, CA; but note *Pavledes v Ryesbridge Properties Ltd* (1989) 58 P & CR 459. See also *Treloar v Nute* [1977] 1 All ER 230, [1976] 1 WLR 1295, CA (levelling the land); *Bladder v Phillips* [1991] EGCS 109, CA.

14 The necessary intention is an intention to possess to the exclusion of all others and not an intent to own the land: *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [42]-[43], [2002] 3 All ER 865 at [42]-[43] per Lord Browne-Wilkinson. See also *Buckinghamshire County Council v Moran* [1990] Ch 623 at 644, [1989] 2 All ER 225 at 238, CA (not following dicta to the contrary in *Littledale v Liverpool College* [1900] 1 Ch 19 at 23, CA, per Lindley MR and in *George Wimpey & Co Ltd v Sohn* [1967] Ch 487 at 510, [1966] 1 All ER 232 at 240, CA, per Russell LJ). The fact that the adverse possessor's belief of ownership is founded on a mistaken premise does not help the paper owner: *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804; *Williams v Usherwood* (1981) 45 P & CR 235, CA.

15 *Smith v Lloyd* (1854) 9 Exch 562 at 572, approving the judgment of Blackburne CJ in *McDonnell v McKinty* (1847) 10 ILR 514 at 526; *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633, CA; *Powell v McFarlane* (1977) 38 P & CR 452. See also *Williams v Usherwood* (1981) 45 P & CR 235, CA.

16 *Williams Bros Direct Supply Stores Ltd v Raftery* [1958] 1 QB 159, [1957] 3 All ER 593, CA, as explained in *Buckinghamshire County Council v Moran* [1990] Ch 623, [1989] 2 All ER 225, CA. Acts which are equivocal as to the intention to exclude the true owner will not suffice: *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633 at 642, CA, per Sachs LJ; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, [1966] 1 All ER 232, CA; *Wilson v Martin's Executors* [1993] 1 EGLR 178, CA.

17 *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, CA (in this case the claimant satisfied the court that it was in exclusive possession of the whole of the length of the wall claimed and that the paper owner had been dispossessed or had discontinued possession; the intention to possess was shown by works to the wall including repairs, cutting through the wall and attaching things to it).

18 *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 88, CA, per Peter Gibson LJ.

19 *Phillipson v Gibbon* (1871) 6 Ch App 428; *Waddington v Naylor* (1889) 60 LT 480. See also *Murly v M'Dermott* (1838) 8 Ad & El 138.

20 *Waddington v Naylor* (1889) 60 LT 480. See further EASEMENTS AND PROFITS A PRENDRE.

21 *Phillipson v Gibbon* (1871) 6 Ch App 428 at 434.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/(iii) By Undisturbed Possession/910. Application of the Limitation Act 1980 to registered land.

910. Application of the Limitation Act 1980 to registered land.

Under the Land Registration Act 1925, when land having a registered title is occupied by an adverse possessor, the registered owner remains the legal owner until the possessor secures his own registration with a possessory title, but, once the limitation period has run, the registered owner holds the legal estate in trust for the possessor[1].

1 See the Land Registration Act 1925 s 75 (as amended; prospectively repealed); and LAND REGISTRATION. See also *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd (Axa Equity and Law Life Assurance Society plc, third party)* [1998] 4 All ER 948 (where a registered leasehold title is extinguished by a squatter, a trust arises under the Land Registration Act 1925 s 75 (as amended; prospectively repealed) which preserves the squatter's statutory rights against the freeholder in the event of a surrender of the lease by the paper owner).

As to adverse possession see LIMITATION PERIODS vol 68 (2008) PARA 1078 et seq; REAL PROPERTY vol 39(2) (Reissue) para 258. As to rectification of the register see LAND REGISTRATION.

As from a day to be appointed, there is to be a revised land registration regime under the Land Registration Act 2002: see LAND REGISTRATION. At the date at which this volume states the law no day had been appointed under s 136(2) for the commencement of the provisions of the Land Registration Act 2002. Under this regime, no period of limitation (ie under the Limitation Act 1980 s 15: see LIMITATION PERIODS vol 68 (2008) PARA 1016) is to run against any person, other than a chargee, in relation to an estate in land the title to which is registered (see the Land Registration Act 2002 s 96(1) (not yet in force)), and accordingly, where a period of limitation does not run against a person, his title is not extinguished (see s 96(3) (not yet in force)). A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application: s 97, Sch 6 para 1 (not yet in force). Notice of such an application must be given by the registrar to certain persons, including the proprietor of the estate to which the application relates, the proprietor of any registered charge on the estate and, where the estate is leasehold, the proprietor of any superior registered estate: see Sch 6 para 2 (not yet in force). The applicant is entitled to be registered as the new proprietor of the estate (see Sch 6 para 4 (not yet in force)), unless a person given notice of the application by the registrar requires the application to be dealt with under Sch 6 para 5 (not yet in force) (see Sch 6 para 3 (not yet in force)). Under Sch 6 para 5 (not yet in force), the applicant is only entitled to be registered if any one of three conditions is met: see Sch 6 para 5(1) (not yet in force). The first condition is that it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and the circumstances are such that the applicant ought to be registered as the proprietor: Sch 6 para 5(2) (not yet in force). The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate: Sch 6 para 5(3) (not yet in force). The third condition, which relates specifically to boundaries, is that: (1) the land to which the application relates is adjacent to land belonging to the applicant; (2) the exact line of the boundary between the two has not been determined under rules made by virtue of s 60(3) (not yet in force) (see para 913 note 2 post); (3) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him; and (4) the estate to which the application relates was registered more than one year prior to the date of the application: Sch 6 para 5(4) (not yet in force). See further LAND REGISTRATION.

UPDATE

910 Application of the Limitation Act 1980 to registered land

TEXT AND NOTE--Repeal of 1925 Act now fully in force: see SI 2003/1725.

Land Registration Act 2002 now fully in force: SI 2003/1725.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(2) BOUNDARIES FIXED BY THE ACT OF THE PARTIES/(iv) By Estoppel/911. Estoppel.

(iv) By Estoppel

911. Estoppel.

If a party takes possession of a piece of land under an expectation, created or encouraged by and with the consent of the true owner, that he is to have an interest in the land and upon the faith of such promise or expectation and without objection by the true owner lays out money on the land or alters his position to his detriment, the court will compel the true owner to give effect to such promise or representation[1]. Knowledge of the correct position by the true owner or the party alleged to be estopped is not an essential prerequisite for the estoppel to operate but merely one of the relevant factors in the overall inquiry[2]. Acting in a transaction on an agreed assumption between two adjoining owners as to the position of a boundary will result in each being estopped against the other from questioning that assumption[3]. If the previous owner of land would have been estopped by his conduct from maintaining an action for

infringement of his boundaries by an adjoining owner, his successor in title is in no better position[4].

1 *Ramsden v Dyson* (1866) LR 1 HL 129 at 170 per Lord Kingsdown; *Willmott v Barber* (1880) 15 ChD 96; *Plimmer v Wellington Corpn* (1884) 9 App Cas 699 at 713, PC; *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA; *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA; *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n, [1981] 1 All ER 897; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA. See also ESTOPPEL.

2 *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n at 152, [1981] 1 All ER 897 at 916 per Oliver J.

3 Spencer Bower and Turner *Estoppel by Representation* (3rd Edn, 1977) p 157; *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 1 All ER 923; and see ESTOPPEL. The courts may prefer to find an inferred agreement as to the boundary line rather than an estoppel: see eg *Stephenson v Johnson* [2000] EGCS 92, CA. As to settling boundaries by agreement see para 903 ante.

4 *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(3) BOUNDARIES FIXED BY STATUTORY OR JUDICIAL AUTHORITY/912. Common land.

(3) BOUNDARIES FIXED BY STATUTORY OR JUDICIAL AUTHORITY

912. Common land.

There remains a power to make orders fixing boundaries in connection with land not liable to be inclosed[1]. These powers may be regarded as obsolete[2].

In the past it has been difficult to determine the boundaries of any particular stretch of common land, since many stretches of common land are contiguous, inter-commonage may blur the boundaries, and there are legal restrictions on placing fences or other physical boundaries round common land[3]. However, the Commons Registration Act 1965 made elaborate provisions for the registration of common land, the rights of common over it and of its owners[4]. Now, once land is registered as common land, the register is authoritative as to, inter alia, the boundaries of the common[5].

1 Ie under the Inclosure Acts 1845 to 1882: see COMMONS vol 13 (2009) PARA 419. See in particular the Inclosure Act 1845 s 148 (as amended); and COMMONS vol 13 (2009) PARA 419.

2 See the *Report of the Royal Commission on Common Land 1955-1958* (Cmnd 462) (1958) Ch III para 82, App II para 56, App III para 43; and COMMONS vol 13 (2009) PARA 419. See also the Statute Law (Repeals) Act 1998 s 1(1), Sch 1 Pt VI, which repealed many provisions of the Inclosure Acts 1845 to 1882.

3 See *Smith v Earl Brownlow* (1870) LR 9 Eq 241. As to statutory restrictions on the inclosure of commons see the Law of Property Act 1925 s 194 (as amended); and COMMONS vol 13 (2009) PARA 419.

4 See the Commons Registration Act 1965 s 1 (prospectively amended); and COMMONS vol 13 (2009) PARA 508.

5 See ibid s 10; the Commons Registration (General) Regulations 1966, SI 1966/1471, regs 16(5), 31, 36 (reg 16(5) as amended); the Commons Registration (Objections and Maps) Regulations 1968, SI 1968/989, reg 9 (as amended); and COMMONS vol 13 (2009) PARAS 508 et seq. As to amendment of the registers where land becomes common land see the Commons Registration Act 1965 s 13 (as amended); the Commons Registration (New

Land) Regulations 1969, SI 1969/1843 (as amended); and COMMONS vol 13 (2009) PARA 516. As to amendment of the registers where land ceases to be common land see the Commons Registration Act 1965 s 13 (as amended); the Commons Registration (General) Regulations 1966, SI 1966/1471, reg 27 (as amended); and COMMONS vol 13 (2009) PARA 493. As to the removal of land from the registers of common land see the Common Land (Rectification of Registers) Act 1989; the Common Land (Rectification of Registers) Regulations 1990, SI 1990/311; and COMMONS vol 13 (2009) PARAS 516, 519.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(3) BOUNDARIES FIXED BY STATUTORY OR JUDICIAL AUTHORITY/913. On registration of land.

913. On registration of land.

Normally, the filed plan of land registered under the Land Registration Act 1925 is deemed to indicate only the general boundaries of the land[1]. However, if an applicant for registration wishes to have indicated on the filed plan, or otherwise to have defined on the register, the precise position of the whole or any part of the boundaries of his land, he may apply for this to be done and notice must then be given by the registrar to the owners and occupiers of all lands adjoining that for which it is proposed to register a fixed boundary with such plan as may be necessary to show the fixed boundaries proposed to be registered[2]. Any person having grounds to do so may make an objection to an application pending before the registrar, and the registrar may determine the questions in dispute or direct one of the parties to issue proceedings in the court to determine them[3].

Renewal, revision or correction of plans and verbal descriptions of registered land may be made at any time on the written application of the proprietor, upon the production of such evidence and the giving of such notices as the registrar may deem necessary[4].

The registrar has power to decide any question arising on a conflict between the verbal particulars of registered land and the filed plan[5].

1 See para 906 ante. Where physical boundaries do not exist, the fullest available particulars of the boundaries are to be added to the filed plan: see the Land Registration Rules 1925, SR & O 1925/1093, r 279 (as amended); para 906 ante; and LAND REGISTRATION. There is no longer a requirement for there to be a Land Registry general map: see the Land Registration (No 2) Rules 1999, SI 1999/2097, r 3 (revoking the Land Registration Rules 1925, SR & O 1925/1093, r 273).

The general boundaries rule will continue under the Land Registration Act 2002: see s 60(1) (not yet in force: see note 2 infra); and para 906 ante.

2 See the Land Registration Rules 1925, SR & O 1925/1093, r 276 (as amended); and LAND REGISTRATION.

As from a day to be appointed, there is to be a revised land registration regime under the Land Registration Act 2002, which provides for rules to be made making provision enabling or requiring the exact line of the boundary of a registered estate to be determined; the rules may, in particular, make provision about the circumstances in which, and how, the exact line of a boundary may be determined, the procedure in relation to applications for determination and the recording of the fact of a determination in the register or index: see ss 1(2), 60(3) (not yet in force). At the date at which this volume states the law no day had been appointed under s 136(2) for the commencement of the provisions of the Land Registration Act 2002. See LAND REGISTRATION.

3 See the Land Registration Rules 1925, SR & O 1925/1093, rr 298, 299 (both as substituted); and LAND REGISTRATION.

4 See ibid r 284(1); and LAND REGISTRATION.

5 See ibid r 285 (as amended); and LAND REGISTRATION.

UPDATE

913 On registration of land

TEXT AND NOTES--Land Registration Rules 1925, SR & O 1925/1093 replaced by Land Registration Rules 2003, SI 2003/1417: see LAND REGISTRATION.

NOTE 2--Day now appointed: SI 2003/1725.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(3) BOUNDARIES FIXED BY STATUTORY OR JUDICIAL AUTHORITY/914. Commissions.

914. Commissions.

Courts exercising jurisdiction in equity have power to order an inquiry, whether by way of a formal commission or by proceedings in chambers[1], to ascertain boundaries when they have become confused, but a mere confusion of boundaries is not per se sufficient ground (except by consent) to support a claim for a commission[2], which would only be granted where some equity was shown arising out of the inequitable conduct of one of the parties[3]. As a rule the commission will direct that, in the event of the boundaries being so confused and obliterated that the commissioners are unable to distinguish them, they are to set out new lands of equal value with those the boundaries of which have been confused[4].

1 See *Searle v Cooke* (1889) 43 ChD 519 at 527 per Kay J (affd (1890) 43 ChD 519 at 529, CA); and EQUITY.

2 See *Marquis of Bute v Glamorganshire Canal Co* (1845) 1 Ph 681 at 684.

3 *Speer v Crawter* (1817) 2 Mer 410; *Miller v Warmington* (1820) 1 Jac & W 484; and see EQUITY. There is no recent instance of a commission being granted.

4 *Ambler's Case* (1770) cited 4 Ves 184; *Willis v Parkinson* (1817) 2 Mer 507.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(3) BOUNDARIES FIXED BY STATUTORY OR JUDICIAL AUTHORITY/915. Common law actions.

915. Common law actions.

Boundaries may also be determined by the court in actions for the recovery of land[1], or for trespass[2], nuisance[3], breach of the covenants for title implied in a conveyance[4], a declaration or injunction[5] or indeed any action in which the title of one of the parties is in issue[6]. In none of these cases does the judgment operate in rem, determining the true boundary conclusively as against all the world, for these actions are all in personam, and the judgment is binding only as between the parties[7]. In an action for the recovery of land the claimant must prove that he is entitled to recover the land as against the person in possession of it[8] and he must recover on the strength of his own title, not on the weakness of the defendant's title[9]. A party to an action in which title is in issue is entitled to disclosure of any deeds or documents in the possession of the other party[10], or of a stranger[11], which contain any evidence as to the title.

1 See eg *Williams Bros Direct Supply Stores Ltd v Raftery* [1958] 1 QB 159, [1957] 3 All ER 593, CA; *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA. As to actions for the recovery of land see REAL PROPERTY vol 39(2) (Reissue) para 259 et seq.

2 See eg *Norton v London and North Western Rly Co* (1879) 13 ChD 268, CA; *Littledale v Liverpool College* [1900] 1 Ch 19, CA; *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343; *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA. See also *Hawkes v Howe* [2002] EWCA Civ 1136. As to trespass to land see TORT vol 45(2) (Reissue) para 505 et seq.

3 See eg *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA. As to nuisance see NUISANCE vol 78 (2010) PARAS 104, 109 et seq.

4 See eg *Eastwood v Ashton* [1915] AC 900, HL.

5 See eg *Mackenzie v Bankes* (1878) 3 App Cas 1324, HL; *Marshall v Taylor* [1895] 1 Ch 641, CA; *Scarfe v Adams* [1981] 1 All ER 843, CA; *Scott v Martin* [1987] 2 All ER 813, [1987] 1 WLR 841, CA; *Mahmood v Yui Tong Man* (1996) 74 P & CR 320, CA. The power to make a binding declaration of right is a discretionary one (*Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, HL), and a declaration will not be made against a person who has asserted no right nor formulated any specific claim (*Re Clay, Clay v Booth* [1919] 1 Ch 66, CA) or whose claim was too indirect (*Thorne RDC v Bunting* [1972] Ch 470, [1972] 1 All ER 439). As to the jurisdiction of the county court to make a declaration or injunction relating to land see the County Courts Act 1984 s 38 (as substituted); and CIVIL PROCEDURE vol 11 (2009) PARA 345; COURTS vol 10 (Reissue) para 711.

6 See eg *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, [1966] 1 All ER 232, CA (vendor and purchaser summons); *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19 (specific performance); *Epps v Esso Petroleum Co Ltd* (1973) 226 EG 1761 (application for rectification of land register).

7 Eg *A-G v Beynon* [1970] Ch 1 at 15, [1969] 2 All ER 263 at 270 per Goff J. As to the distinction between actions in rem and actions in personam see *Castrique v Imrie* (1870) LR 4 HL 414.

8 If the claimant has been wrongly dispossessed he may succeed against the wrongdoer notwithstanding that the true title may be shown to be in a third person: *Asher v Whitlock* (1865) LR 1 QB 1; *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA.

9 *Goodtitle d Parker v Baldwin* (1809) 11 East 488 at 495; *Danford v McAnulty* (1883) 8 App Cas 456 at 462, HL; *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 901, [1999] 1 WLR 894 at 898, HL, per Lord Hoffmann. As to the position where the claimant is not in possession see *Palmer v Palmer* [1892] 1 QB 319; and REAL PROPERTY.

10 *Burrell v Nicholson* (1833) 1 My & K 680 at 681 per Lord Brougham; *A-G v Emerson* (1882) 10 QBD 191, CA; *Neilson v Poole* (1969) 20 P & CR 909. A party may be entitled to see the parcels of deeds without being entitled to see the operative part: *Lind v Isle of Wight Ferry Co* (1860) 2 LT 503. As to disclosure see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

11 See the Civil Evidence Act 1968 s 16(1)(b); and CIVIL PROCEDURE vol 11 (2009) PARA 970.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/916. Rebuttable presumptions.

(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS

916. Rebuttable presumptions.

An artificial boundary structure belongs to the owner of the land on which it exists, but very often it is difficult to determine precisely where the boundary lies and hence to whom the feature belongs. If, on their true construction[1] with such extrinsic evidence as is admissible[2], the title deeds do not clearly fix the position of the boundary of land in relation to certain boundary features, resort may be had to well-established legal presumptions which apply in relation to

those features and which assist the inferences which may be drawn from them[3]. All the presumptions recognised and obtaining in the case of boundaries are rebuttable, and not irrebuttable or conclusive presumptions[4]; that is to say, evidence to rebut the presumptions is always admissible, but, until it is produced, the presumptions necessarily apply[5].

1 The presumptions are only applicable if the deeds are unclear and admissible evidence does not answer any ambiguities: see *Stone v Clarke* (1840) 1 Met 378; *Fisher v Winch* [1939] 1 KB 666 at 669, [1939] 2 All ER 144 at 145, CA, per Sir Wilfrid Greene MR, and at 674 and 148 per Goddard LJ.

2 See para 929 post.

3 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 900, [1999] 1 WLR 894 at 897, HL, per Lord Hoffmann.

4 Ie *praesumptiones juris* and not *praesumptiones juris et de jure*: see Denning LJ 'Presumptions and Burdens' (1945) 61 LQR 379; *Huyton-with-Roby UDC v Hunter* [1955] 2 All ER 398 at 400, [1955] 1 WLR 603 at 609, CA, per Denning LJ; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154 at 193, [1941] 2 All ER 165 at 191, HL, per Lord Wright. See also CIVIL PROCEDURE vol 11 (2009) PARA 1096 et seq.

5 See *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL (where there is no evidence as to the precise boundary line, the presumptions are the best guide to the line of the boundary); *Hall v Dorling* (1996) 74 P & CR 400, CA. See paras 904 ante, 918 post. As to the application of these presumptions to registered titles see para 906 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/917. Fences.

917. Fences.

In the case of wooden fences, it is likely to be inferred that, in the absence of freeboard[1], the owner of land will use his land to the fullest extent so that the fence will be deemed to belong to the person on whose side the rails and posts are placed, the palings being placed on his neighbour's side[2], but where there is a dispute it would be necessary to show acts of ownership; that is, an owner may establish acts of ownership by himself to show that the fence is his or acts of ownership by his neighbour to show that the fence is the latter's responsibility[3]. Alternatively, the owners may have agreed to share responsibility[4]. However, where a fenced close adjoins a piece of waste land, there is a presumption that the fence belongs to the owner of the close[5].

1 As to freeboard see paras 918 note 8, 947 post.

2 If the fence was erected the reverse way, the palings would not enclose the small strips of land between the posts.

3 As to evidence by acts of ownership see para 931 post.

4 As to party fences see para 961 et seq post.

5 *White v Taylor (No 2)* [1969] 1 Ch 160 at 200, [1968] 1 All ER 1015 at 1037 per Buckley J.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/918. Hedges and ditches.

918. Hedges and ditches.

No man making a ditch may cut into his neighbour's soil, but usually he makes it at the very extremity of his own land, forming a bank on his own side with the soil which he excavates from the ditch, on the top of which bank a hedge is usually planted[1]. Therefore, where two fields, or a field and the garden of a dwelling, are separated by a hedge or bank and an artificial ditch, the presumption or inference drawn from the hedge and ditch feature is that the boundary prima facie runs along the side of the ditch further from the hedge or bank[2]. This is based on the assumptions that: (1) the ditch was dug after the boundary was drawn; and (2) the ditch was dug and the hedge then planted[3]. The presumption is therefore only applicable when it is known that the ditch is artificial[4]. If the ditch was made while the lands either side were in common ownership, the presumption will be inapplicable because the ditch was there before the boundary was drawn[5]. Further, the presumption does not apply where the title deeds show what the boundary is[6], so a conveyance which describes or delimits the land transferred by reference to an ordnance survey map or plan on which the boundaries are marked as a centre line of the hedge will rebut the presumption[7].

An impression once prevailed in some districts that the owner of a bank and ditch is entitled to four feet of width for the base of the bank and four feet of width for the ditch, but, apart from any local custom, there is no rule to this effect[8].

Acts of ownership such as trimming and pollarding a hedge and cleaning a ditch, even though continued for many years by an adjoining owner, do not rebut the presumption that the ditch and hedge belong to the owner of the land nearer to the hedge, particularly if the acts were done without the knowledge of the presumptive owner[9]. Title to a ditch beside a hedge, or such a ditch that has been filled in, may be claimed under the Limitation Act 1980 in accordance with standard principles[10].

Where two pieces of land are divided by two ditches one on each side of a hedge or bank, or by two hedges or banks one on each side of a ditch, or by an old hedge or bank without any ditches at all, or by a ditch alone with no bank or hedge, then there is no presumption as to the ownership of the hedges, ditches, or banks, but it must be proved by acts of ownership exercised over them[11].

If the adjoining owners on each side concurrently exercise acts of ownership, and it is not known what quantity of land each of the owners originally contributed towards the formation of the ditch or bank, that may be evidence that the hedge, ditch or bank is a party fence[12]. If the true boundary is known, however, it will not be altered merely by concurrent acts of ownership[13].

1 *Vowles v Miller* (1810) 3 Taunt 137 at 138 per Lawrence J; *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 900, [1999] 1 WLR 894 at 897, HL, per Lord Hoffmann.

2 *Noye v Reed* (1827) 1 Man & Ry KB 63 at 65 per Bayley J; *Guy v West* (1808) cited in 2 Selwyn's NP (13th Edn) 1244; *Hall v Dorling* (1996) 74 P & CR 400, CA.

3 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 900, [1999] 1 WLR 894 at 897, HL, per Lord Hoffmann. So if the ditch was in existence before the boundary was drawn, or the hedge existed before the ditch was dug, there is no room for the presumption to operate.

4 *Marshall v Taylor* [1895] 1 Ch 641 at 647, CA. This limitation was treated as correct in *Collis v Amphlett* [1918] 1 Ch 232 at 253, CA, per Warrington LJ, and at 260 per Scrutton LJ (revsd on the facts [1920] AC 271, HL).

5 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 903, [1999] 1 WLR 894 at 900, HL, per Lord Hoffmann, explaining *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA (although this was not the basis of the decision).

6 *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA (where, per Goddard LJ at 673-674 and 148, it was stressed that the principle is a rebuttable presumption and not a custom); *Davey v Harrow Corpn* [1958] 1 QB

60, [1957] 2 All ER 305, CA; *Falkingham v Farley* (1991) Times, 11 March, CA (presumption rebutted by strong evidence of a carefully prepared plan executed for the purpose of an auction of the land in 1914).

7 *Rouse v Gravelworks Ltd* [1940] 1 KB 489, [1940] 1 All ER 26, CA; *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA. Such a conveyance cannot, however, operate to pass title to a strip of land such as the ditch where no title previously existed: *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897 at 904, [1999] 1 WLR 894 at 902, HL, per Lord Hope of Craighead. As to the use of ordnance survey maps see para 905 ante.

8 *Vowles v Miller* (1810) 3 Taunt 137; *Fisher v Winch* [1939] 1 KB 666 at 673, [1939] 2 All ER 144 at 148, CA, per MacKinnon LJ, applying *Collis v Amphlett* [1918] 1 Ch 232 at 259, CA, per Scrutton LJ (whose dissenting judgment was upheld when the decision was reversed in the House of Lords (see [1920] AC 271, HL)). In some places a right of 'freeboard' or 'deerleap' extending several feet beyond the hedge is claimed by local custom, possibly as a way of limiting encroachment by the ditch onto the adjoining land: see further para 947 post. As to local customs see generally CUSTOM AND USAGE. Where, on a map attached to an award made under a local Act for the regulation of a common, the boundary of the common was delineated by a line drawn along the line of 'growers' in a hedge dividing the common from the land of an adjacent owner, the hedge belonging to such owner, there was no presumption that the owner was entitled to a ditch-width on the outside of the line of growers: *Collis v Amphlett* [1920] AC 271, HL.

9 *Henniker v Howard* (1904) 90 LT 157, DC; *Earl of Craven v Pridmore* (1902) 18 TLR 282, CA. See also *Searby v Tottenham Rly Co* (1868) LR 5 Eq 409. Cf *Marshall v Taylor* [1895] 1 Ch 641, CA (trimming a hedge alongside a ditch which had been filled in would not have prevented a claim that title had been acquired by limitation over the site of the ditch). However, it seems that putting foundations of a dwelling into part of the ditch and laying a concrete path over a part of the ditch that has been filled in may be sufficient for a claim based on adverse possession of that part: see *Hall v Dorling* (1996) 74 P & CR 400, CA. See also the text and note 10 infra.

10 See *Marshall v Taylor* [1895] 1 Ch 641, CA; *Hall v Dorling* (1996) 74 P & CR 400, CA. As to claims based on adverse possession under the Limitation Act 1980 see para 909 ante.

11 *Guy v West* (1808) cited in 2 Selwyn's NP (13th Edn) 1244. Cf *Re Belfast Dock Act 1854, ex p Earl of Ranfurly* (1867) IR 1 Eq 128. But if the presumption does apply, acts of ownership done without the knowledge of the owner will not rebut the presumption: see note 9 supra.

12 Prior to 1 January 1926 (the date of the commencement of the Law of Property Act 1925), it would have been evidence that the hedge, ditch or bank was held in tenancy in common. It is doubtful whether a hedge and ditch is a structure that can fall within the provisions relating to party walls and fences: see para 961 et seq post.

13 Woolrych *The Law of Party Walls and Fences* p 283. Cf *Matts v Hawkins* (1813) 5 Taunt 20.

919. Hedges and ditches beside highways.

The principles relating to hedges and ditches generally[1] also apply in the rare case of hedges and ditches running along the side of a public highway where the soil of the highway is not owned by the owners of the adjoining land[2]. The hedge and ditch are presumed to be owned by the owner of the adjoining land, for he could only lawfully have dug the ditch in his own land[3]. The presumption, however, would yield to contrary evidence, for example evidence that the ditch was constructed by the owners of the road, in which case the ditch would remain part of the road[4]. Moreover, a ditch running alongside a highway between the road and fence may be dedicated as part of the highway[5], but the presumption is that a ditch, which is not prima facie adapted for exercise by the public of their right to pass and repass, is not part of the highway[6].

Where a highway of a definite width has been laid out under inclosure legislation[7], there is no presumption that an adjoining ditch and hedge form part of the highway, if the highway by itself is of the definite width[8].

1 See para 918 ante.

2 As to the more usual presumption in the case of highways see para 920 post. As to highways generally see HIGHWAYS, STREETS AND BRIDGES.

3 *Doe d Pring v Pearsey* (1827) 7 B & C 304. See also *Chippendale v Pontefract RDC* (1907) 71 JP 231 (county court); *Hanscombe v Bedfordshire County Council* [1938] Ch 944, [1938] 3 All ER 647. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 205. As to the circumstances in which an obligation exists to fence see para 948 post.

4 *Searby v Tottenham Rly Co* (1868) LR 5 Eq 409.

5 *Chorley Corpn v Nightingale* [1907] 2 KB 637, CA. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 205.

6 *Hanscombe v Bedfordshire County Council* [1938] Ch 944, [1938] 3 All ER 647. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 205.

7 As to inclosure see COMMONS vol 13 (2009) PARA 418 et seq.

8 *Simcox v Yardley RDC* (1905) 69 JP 66. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 205.

920. Highway boundaries.

Where land is bounded by a highway, or a private right of way, there are three interrelated presumptions which may apply.

The first presumption is that the boundary is, as a general rule, a line drawn along the middle of the highway[1] or private right of way[2]. This arises because the owners of land adjoining[3] the highway or way are presumed, in the absence of any evidence to the contrary, to own the subsoil as far as the middle of the road[4] and the airspace above the soil subject only to the right of passage over the surface[5] and the rights of the highway authority[6]. The presumption obtains also where the land was formerly of copyhold tenure[7] and the better view is that it also applies in the case of leaseholders[8].

The second presumption is that subsoil up to the centre of the highway will pass in a conveyance or transfer without express mention[9]; the mere fact that a conveyance describes land as being bounded by a highway[10] or that measurements or a plan by reference to which land is conveyed exclude any part of the highway will not rebut the presumption[11], for it would be absurd to suppose that the grantor retained the soil of the highway, which in nearly every case would be wholly valueless[12]. However, the presumption may readily yield to indications of a contrary intention[13], as in the case of the conveyance of a plot on a building estate[14].

These presumptions apply under the general boundaries rule in the case of registered land[15], but it is not the practice of the Land Registry to show the half-width of the highway as being within the title so the boundary line shown on a Land Registry plan does not rebut the presumption[16].

The third presumption (sometimes referred to as the 'hedge to hedge' presumption) is that, where a highway is bounded on both sides by fences or hedges, the highway is not confined to any metalled portion but is presumed to extend up to both such hedges or fences provided that it is clear that they were placed to separate the adjoining land from the highway[17]. The presumption depends on the fence or hedge being erected by reference to the highway in order to separate private land from land over which public rights of way are exercised, and this

fact must be established before the presumption applies[18]. Where a highway passes through unenclosed land the boundary of the highway is the edge of the metalled portion unless there is evidence of use of any additional land as part of the highway[19].

If the highway is separated from the adjoining land by a wayside strip[20] then the presumption is that the highway rights extend over such wayside strip but the subsoil belongs to the adjoining owner[21].

1 *Goodtitle d Chester v Alker and Elmes* (1757) 1 Burr 133; *Anon* (1773) Lofft 358; *Stevens v Whistler* (1809) 11 East 51; *Cooke v Green* (1823) 11 Price 736; *Coverdale v Charlton* (1878) 4 QBD 104; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572 (affd [1975] 1 All ER 772, [1975] 1 WLR 468, CA); *Bridges v Harrow London Borough Council* (1981) 260 EG 284; *Russell v Barnet London Borough Council* [1984] 2 EGLR 44. The presumption is applicable to properties in the town as well as the country (*Re White's Charities, Charity Comrs v London Corpn* [1898] 1 Ch 659), to cases where one owner's adjoining land is primarily covered with water (*Frost v Richardson* (1910) 103 LT 416, CA), and to cases where no grant or conveyance has to be construed (*City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364 at 371, HL). The presumption would also seem to apply, in the absence of evidence to rebut it, where properties are divided by a public footpath or bridleway. It primarily applies where the conveyancing history of the land and the road is unknown: *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978. Where modern roads have been constructed on land compulsorily acquired or purchased, the presumption does not apply. As to the acquisition of land for highway purposes see the Highways Act 1980 ss 238-262 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 77 et seq. As to highways generally see HIGHWAYS, STREETS AND BRIDGES.

2 *Holmes v Bellingham* (1859) 29 LJCP 132; *Smith v Howden* (1863) 14 CBNS 398; *Pardoe v Pennington* (1996) 75 P & CR 264, CA. As to private ways generally see EASEMENTS AND PROFITS A PRENDRE.

3 Land adjoins a highway for this purpose although separated from it by a public right of way not being part of the street: *Ware UDC v Gaunt* [1960] 3 All ER 778, [1960] 1 WLR 1364, DC. As to the analogous issue of when a property is 'fronting' the street for the purposes of the Highway Act 1980 ss 203, 205 (as amended) (private street works: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 146 et seq) see *Warwickshire County Council v Adkins* (1967) 66 LGR 486, DC; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 154.

4 Ie *usque ad medium filum viae*. The presumption is based on convenience, to prevent disputes as to precise boundaries and on the supposition that each owner contributed a portion of land when the highway was formed: *Holmes v Bellingham* (1859) 29 LJCP 132. For an appraisal of the rationale of the rule see *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902 at 914, [1973] 1 WLR 1572 at 1583-1584 per Megarry J.

5 *Harrison v Duke of Rutland* [1893] 1 QB 142 at 155, CA; *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL; *Lang v House* (1961) 178 EG 801. But the owner cannot use the subsoil so as to interfere with the use of the highway: *Goodson v Richardson* (1874) 9 Ch App 221.

6 The surface of the road or highway vests in the highway authority together with so much of the soil as is necessary for the authority to perform its statutory duties: *Hertfordshire County Council v Lea Sand Ltd* (1933) 98 JP 109 at 112. This is a legal interest in fee simple of the 'top spit' determinable on the land ceasing to be a highway: *Tithe Redemption Commission v Runcorn UDC* [1954] Ch 383 at 407, [1954] 1 All ER 653 at 661, CA, per Denning LJ. As to the vesting of highways maintainable at public expense see also the Highways Act 1980 s 263 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 225. Thus, apart from statute, the highway authority could not prevent the construction of cellars under the highway or the erection of telephone wires or buildings above the highway which did not interfere with passage: *Wandsworth Board of Works v United Telephone Co* (1884) 13 QBD 904; *New Towns Commission v Hemel Hempstead Corpn* [1962] 3 All ER 183, [1962] 1 WLR 1158. Statutory provisions restricting building and other works in, under or over the highway have substantially altered the law: see the Highways Act 1980 ss 169-180 (as amended); and HIGHWAYS, STREETS AND BRIDGES.

7 *Doe d Pring v Pearsey* (1827) 7 B & C 304; *Tilbury v Silva* (1890) 45 ChD 98 at 109. As to the abolition of copyhold tenure see CUSTOM AND USAGE vol 12(1) (Reissue) para 643; REAL PROPERTY vol 39(2) (Reissue) para 31.

8 *Haynes v King* [1893] 3 Ch 439; *Dwyer v Rich* (1871) IR 6 CL 144; *Tilbury v Silva* (1890) 45 ChD 98 at 109. However, in relation to leaseholders the applicability of the presumption was expressly reserved in *Landrock v Metropolitan District Rly Co* (1886) 3 TLR 162, CA, per Lord Esher MR and in *Mappin Bros v Liberty & Co Ltd* [1903] 1 Ch 118 per Joyce J. *Tilbury v Silva* supra was accepted as a correct statement of the law in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 715, [1982] 1 All ER 283 at 287, PC. Cf *Davies v Yadegar* [1990] 1 EGLR 71, CA (lease includes airspace above a demised roof). See also para 902 ante.

9 *London and North Western Rly Co v Westminster Corpn* [1902] 1 Ch 269 (affd [1905] AC 426, HL); *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL. This presumption will not apply in cases where there is an intention to exclude the road: *Mappin Bros v Liberty & Co Ltd* [1903] 1 Ch 118 (lease by commissioners abutting Regent Street which they had laid out; the presumption was rebutted when regard was had to the statutory powers and the terms of the lease).

10 *Beckett v Corpn of Leeds* (1872) 7 Ch App 421. As to how far boundary features generally are included in the property described see para 908 ante.

11 *Berridge v Ward* (1861) 10 CBNS 400, approved in *Pardoe v Pennington* (1996) 75 P & CR 264, CA; *Pryor v Petre* [1894] 2 Ch 11, CA. See also *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364 at 379, HL, per Lord Shaw of Dunfermline ('The presumption [of ownership *ad medium filum*] operates not only in cases where the boundary is expressed to be by the highway or street, but also in the cases where the properties are delineated by plan or colour or measurement'), quoted with approval in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 718, [1982] 1 All ER 283 at 289, PC. Cf *Mellor v Walmesley* [1905] 2 Ch 164, CA (a case concerning the foreshore: see para 922 post); *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, CA (a case concerning a river: see para 924 post).

12 *Lord v Sydney City Comrs* (1859) 12 Moo PCC 473. There may, however, be something in the context to rebut the presumption, such as a covenant on the part of the grantor to make up the road, and of course the presumption does not apply where the grantor did not own the half-width of road.

13 *Pryor v Petre* [1894] 2 Ch 11 at 19, CA, per Lindley LJ; *Pardoe v Pennington* (1996) 75 P & CR 264, CA (an assent of part of an estate did not include the soil under a bridleway since the presumption was rebutted by the attendant circumstances).

14 *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978 (property more particularly delineated on a plan held to exclude any part of the roadway of the building estate); *Plumstead Board of Works v British Land Co* (1874) LR 10 QB 16 (revsd on other grounds (1874) LR 10 QB 203); *Leigh v Jack* (1879) 5 ExD 264, CA.

15 See para 906 ante.

16 *Russell v Barnet London Borough Council* [1984] 2 EGLR 44 (plans used for the registration of title are of little evidential value). As to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) para 1064.

17 *A-G v Beynon* [1970] Ch 1, [1969] 2 All ER 263; *Hinds and Diplock v Breconshire County Council* [1938] 4 All ER 24; *Offin v Rochford RDC* [1906] 1 Ch 342; *Naydler v Hampshire County Council* (1973) 226 EG 1761; cf *Minting v Ramage* [1991] EGCS 12, CA (fence to fence presumption was rebutted where the highway ran across a common and it was shown that the fence abutting the common pre-dated the highway). As to the extent of the public right of passage where the highway runs between fences see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 202.

18 *A-G v Beynon* [1970] Ch 1 at 12-13, [1969] 2 All ER 263 at 268 per Goff J; *Hale v Norfolk County Council* [2001] Ch 717, CA (evidence showed there was no intention to fence against the highway and so no presumption of dedication of the land between the fence and the highway).

19 *Easton v Richmond Highway Board* (1871) LR 7 QB 69. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 201. By virtue of the Highways Act 1980 s 160A, Sch 12A (as added), provision is made for determining both the minimum and the maximum width of a footpath, bridleway or highway where the width is not proved: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 489.

20 See HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 219.

21 *Steel v Prickett* (1819) 2 Stark 463; *Offin v Rochford RDC* [1906] 1 Ch 342.

UPDATE

920 Highway boundaries

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement

and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/921. Railways.

921. Railways.

The presumption that a grant of land described as bounded by a highway passes one-half of the soil of the highway does not obtain in the case of conveyances of land described as bounded by a railway[1], and therefore a grant of land so described will not pass a right to the minerals under the railway[2]. However, the minerals may be vested in the adjoining owner by virtue of the conveyance when the railway undertaking acquired the land[3].

1 This is because the land acquired for the railway would have been acquired as a separate plot. As to railways generally see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES.

2 *Thompson v Hickman* [1907] 1 Ch 550. See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) paras 24, 308. As to the duty to fence railways see para 950 post.

3 Conveyances under the Railways Clauses Consolidation Act 1845 s 77 do not pass mines and minerals unless they are expressly included: see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 308.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/922. Seashore or foreshore.

922. Seashore or foreshore.

The boundary line between the seashore[1] and the adjoining land is, in the absence of usage or evidence to the contrary[2], the line of the median high tide between the ordinary spring and neap tides[3].

The boundary of land abutting upon the seashore may vary from time to time, and in the case of a conveyance of land described as bounded by the seashore, then, as the medium high and low water marks shift, so does the boundary of the land shift also; for there may be a movable freehold[4]. This rule applies whether or not the grant of the land adjoining the seashore is accompanied by a map showing the boundary or contains a parcels clause stating the area of the land and whether or not the original boundary can be identified[5], but a fixed boundary may result if clear words and an intention so to do are shown in the conveyance[6].

The boundary of the seashore or foreshore with the high seas is probably the median low tide between the ordinary spring and neap tides[7].

1 The seashore (or foreshore, which has the same meaning: *Mellor v Walmesley* [1905] 2 Ch 164, CA) consists of the land lying between the high and low water marks: *A-G v Chambers* (1854) 4 De GM & G 206; *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55. The same rule probably applies where a property is described as being bounded by the 'sea beach': *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 718, [1982] 1 All ER 283 at 289, PC. As to the rule that prima facie the seashore belongs to the Crown see further CROWN PROPERTY vol 12(1) (Reissue) para 242 et seq. As to the seaward limits of territorial jurisdiction see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 121 et seq; WATER AND WATERWAYS vol 100 (2009) PARA 31 et seq.

2 See eg *Esquimault and Nanaimo Rly Co v Treat* (1919) 121 LT 657, PC ('coast line' held to mean the boundary at high water mark).

3 *A-G v Chambers* (1854) 4 De GM & G 206. Cf *Lowe v Govett* (1832) 3 B & Ad 863.

4 *Scratton v Brown* (1825) 4 B & C 485; *Smart & Co v Suva Town Board* [1893] AC 301, PC; *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC. Cf *Secretary of State for India in Council v Foucar & Co* (1933) 61 LR Ind App 18, PC. As to the effect of accretion and diluvion see para 926 post; and WATER AND WATERWAYS vol 100 (2009) PARA 39 et seq.

5 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 716, [1982] 1 All ER 283 at 287-288, PC; *A-G v M'Carthy* [1911] 2 IR 260 (boundary could still be altered even where the former line of ordinary high water could be ascertained by markers).

6 *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620 (conveyance by Crown, with plan of some precision, of land then part of the foreshore and between high and low water marks was held to be a conveyance of a fixed area of land and of the movable freehold of the foreshore which had retreated). See also *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 718, [1982] 1 All ER 283 at 289, PC.

7 See *R v Howlett* (1967) Times, 4 February (convictions quashed on other grounds (1968) 112 Sol Jo 150); *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620. As to the limits of the seashore see generally WATER AND WATERWAYS vol 100 (2009) PARA 34.

923. Lakes.

Since the bed of even large inland lakes does not vest in the Crown[1], the ownership of the bed of a lake is determined in accordance with normal rules of title. A lake entirely within the boundaries of one piece of land will pass with it without express reference and if the lake is in different ownership, it is submitted that the boundary will be the normal edge of the lake unless the relevant conveyance sets precise boundaries[2].

Where there is a lake bounded by a number of separate proprietors on its edge, the titles may be such as to show that one has the exclusive title to the lake, or, even where the titles do not show it, there may be evidence of possession for such a long time as to show either that there has been exclusive possession by one proprietor, or that there are boundary lines set by the title deeds, or that there has been 'promiscuous possession'[3]. In the absence of any clear title or evidence as to possession[4], the position is doubtful; there does not appear to be any presumption as to the boundary[5].

The doctrine of accretion to boundaries applies to inland lakes[6].

1 *Bristow v Cormican* (1878) 3 App Cas 641, HL. See also *Johnston v O'Neill* [1911] AC 552, HL.

2 There is no direct authority, but see *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

3 *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1340, HL, per Lord Blackburn discussing the Scots law.

4 See *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA.

5 In *Marshall v Ulleswater Steam Navigation Co Ltd* (1863) 3 B & S 732 at 742, the question whether the soil of lakes prima facie belongs to riparian owners *ad medium filum aquae* was left undecided, though it was said to be clear that the soil of land covered with water might, together with the water and fishing rights therein, be specially appropriated to a third person, whether he had land or not on the borders thereof or adjacent thereto. See also *Bristow v Cormican* (1878) 3 App Cas 641 at 666, HL, per Lord Blackburn; *Bloomfield v Johnston* (1868)

IR 8 CL 68 at 95, 97. As to the application of the *usque ad medium filum aquae* rule under Scots law see *Mackenzie v Bankes* (1878) 3 App Cas 1324 at 1338, HL, per Lord Selborne, where it was suggested that there should be a medium line down the centre of the lake in the case of two properties and radial lines in the case of several riparian owners. See further WATER AND WATERWAYS vol 100 (2009) PARA 80.

6 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC, overruling *Trafford v Thrower* (1929) 45 TLR 502. As to the doctrine of accretion see para 926 post; and WATER AND WATERWAYS vol 100 (2009) PARA 77.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/924. Tidal and non-tidal rivers.

924. Tidal and non-tidal rivers.

Where land is said to be bounded by a river, a distinction must be made between tidal rivers and non-tidal rivers.

In those parts of rivers where the tide flows and reflows, the soil between the medium high water mark and medium low water mark prima facie belongs to the Crown[1], and therefore the boundary between the bed of a tidal river and the adjoining land is, as a general rule, the line of medium high water mark[2]. A tidal river is one where the water is subject to the ebb and flow of the tide[3] whether the movement is lateral or vertical[4]. The right of the Crown ceases at that point in the river where the tide ceases to ebb and flow[5].

In the case of non-tidal rivers or streams[6], whether navigable or not, the boundary is in general the line of mid-stream, because, in the absence of any evidence to the contrary[7], the bed[8] of such rivers and streams is presumed to belong to the riparian owners as far as the middle of the stream[9]. Similarly, a conveyance of a property bounded by a stream normally includes the bed of the stream to the median line[10]. Where the ordinary presumption is rebutted, and the bed of the river is the property of some person other than the riparian owners, the boundary is the water line when the river is in its normal state, without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn[11].

The ownership of a several fishery in a river, navigable or non-navigable, public or private, raises a presumption that the freehold in the bed of the river is vested in the owner of the fishery[12].

1 Hale's de Jure Maris (Hargrave's Law Tracts 12, 25); *Constable's Case* (1601) 5 Co Rep 106a; *Lyon v Fishmongers' Co* (1875) 10 Ch App 679 at 689; *R v Smith* (1780) 2 Doug KB 441; *Lord Advocate for Scotland v Hamilton* (1852) 1 Macq 46, HL; *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. As to ownership of the soil in tidal inland waters see further WATER AND WATERWAYS vol 100 (2009) PARAS 71-73. As to the right of navigation in tidal waters see WATER AND WATERWAYS vol 100 (2009) PARAS 46, 72; WATER AND WATERWAYS vol 101 (2009) PARA 689 et seq.

2 *A-G v Chambers* (1854) 4 De GM & G 206; *Bridgwater Trustees v Bootle-cum-Linacre* (1866) LR 2 QB 4 (parish boundary); *Mellor v Walmesley* [1905] 2 Ch 164 at 179-180, CA.

3 *Reece v Miller* (1882) 8 QBD 626, DC; *Ingram v Percival* [1969] 1 QB 548, [1968] 3 All ER 657, DC. See also *Yorkshire Derwent Trust Ltd v Brotherton* (1988) 59 P & CR 60 at 77-78 per Vinelott J; affd sub nom *A-G (ex rel Yorkshire Derwent Trust Ltd) v Brotherton* [1992] 1 AC 425, [1992] 1 All ER 230, HL.

4 *Ingram v Percival* [1969] 1 QB 548 at 555, [1968] 3 All ER 657 at 659, DC, per Lord Parker CJ.

5 See eg *Micklethwait v Vincent* (1892) 67 LT 225, CA.

6 A stream, river or brook implies water in motion as distinguished from stagnant water: *M'Nab v Robertson* [1897] AC 129, HL.

7 Eg evidence that the grantor at the time of the grant in question did not own to the centre. In *Ecroyd v Coulthard* [1898] 2 Ch 358, CA, the ordinary presumption was rebutted in the case of an award under a private Inclosure Act when the river bed did not form part of the lands which were authorised to be allotted.

8 A bed of a stream has been defined as the soil under the water between the banks: *Gooldon v Thames Conservators* (1955, unreported), HL, noted at 19 Conv (NS) 172.

9 Hale's de Jure Maris (Hargrave's Law Tracts 5); *Wishart v Wyllie* (1853) 1 Macq 389, HL; *Wright v Howard* (1823) 1 Sim & St 190 at 203. Cf *R v Landulph Inhabitants* (1834) 1 Mood & R 393; *Edleston v Crossley & Sons Ltd* (1868) 18 LT 15; *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133 at 145, CA; *Blount v Layard* [1891] 2 Ch 681n at 689n, CA. As to ownership of the soil in non-tidal inland waters see further WATER AND WATERWAYS vol 100 (2009) PARA 74 et seq. As to the right of navigation in non-tidal waters see WATER AND WATERWAYS vol 101 (2009) PARA 701 et seq.

10 *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, CA; *Dwyer v Rich* (1870) IR 4 CL 424; *Thames Conservators v Kent* [1918] 2 KB 272, CA (where land was bounded by two ways, in this case a towpath and a river, the presumption extended to cover the river as well as the towpath so that the whole of the soil of the towpath was vested in the adjoining owner); *Hesketh v Willis Cruises Ltd* (1968) 19 P & CR 573, CA. The presumption applies on the grant of a lease: *Tilbury v Silva* (1890) 45 ChD 98 at 109; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

11 *Hindson v Ashby* [1896] 2 Ch 1 at 25, CA, per AL Smith LJ, quoting *State of Alabama v State of Georgia* 64 US 505 (1859) at 515; *Foster v Wright* (1878) 4 CPD 438 at 448. See also *Jones v Williams* (1837) 2 M & W 326 (one riparian owner successfully claimed the whole bed of a stream by showing acts of ownership over it).

12 *Holford v Bailey* (1849) 13 QB 426 at 444; *A-G v Emerson* [1891] AC 649 at 654, HL; *Hanbury v Jenkins* [1901] 2 Ch 401; *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602. As to the ownership of a several fishery see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) para 805 et seq.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/925. Islands.

925. Islands.

There are no special presumptions applicable to existing islands[1]. If an island arises in a tidal river, it will belong to the Crown; if it arises in a non-tidal river, it will belong to the near side owner if entirely on one side of the median line or to the adjoining riparian owners in proportion as the centre line of the stream bisects it[2].

1 As to the presumptions generally applicable see paras 922-924 ante. There is some uncertainty as to the application of the mid-stream boundary presumption to existing islands in rivers: see *Great Torrington Commons Conservators v Moore Stevens* [1904] 1 Ch 347 (*medium filum aquae* drawn through stream between bank and island, plaintiffs showing no evidence of title to island); *Menzies v Marquess of Breadalbane* (1901) 4 F 55, Ct of Sess (*medium filum* drawn between two banks and through two islands).

2 *Wedderburn v Paterson* (1864) 2 M 902; *Earl Zetland v Glover Incorporation of Perth* (1870) LR 2 Sc & Div 70, HL. See also WATER AND WATERWAYS vol 100 (2009) PARAS 73, 79.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/1. DELIMITATION OF BOUNDARIES/(4) BOUNDARIES FIXED BY LEGAL PRESUMPTIONS/926. Effect of accretion or diluvion.

926. Effect of accretion or diluvion.

By the doctrine of accretion, which applies to all land with a water boundary[1], the title of the owner of the adjoining land extends to that land as added to or detracted from by accretion or

diluvion[2]. The doctrine applies whether or not the original grant of the land is accompanied by a map showing the boundary[3], or contains a parcels clause stating the specific measurement or area of the land[4], and whether or not the original boundary can be identified[5]. Consequently, if by gradual and imperceptible accretions in the ordinary course of nature, land is added to the riverside, such land belongs to the riparian owners, and the boundary line correspondingly advances[6]. The doctrine of accretion also applies to changes caused by human action[7] and to natural causes other than fluvial action[8]. The doctrine operates against the Crown[9]. The land added by accretion is subject to the same leasehold or other interests and customs as affected the land to which the accretion took place[10].

The doctrine only applies where the accretion is by gradual and imperceptible means[11] and therefore is not applicable where a tidal[12] or non-tidal[13] river separating two properties suddenly changes its course.

The application of the doctrine of accretion may be excluded in any particular case but the intention to do so must be plainly shown[14].

1 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC, where the doctrine of accretion is stated as applying to land bounded by rivers, lakes and the sea. The Privy Council disagreed with the decision in *Trafford v Thrower* (1929) 45 TLR 502, where the judge held that accretion did not apply to an inland lake (the Norfolk Broads). As to the doctrine of accretion see further WATER AND WATERWAYS vol 100 (2009) PARAS 39 et seq, 77.

2 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 716, [1982] 1 All ER 283 at 287, PC. For a case where land was lost to the Crown by application of the principle see *Re Hull and Selby Rly Co* (1839) 5 M & W 327.

3 *Government of the State of Penang v Beng Hong Oon* [1972] AC 425, [1971] 3 All ER 1163, PC.

4 *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 612, PC.

5 *A-G v M'Carthy* [1911] 2 IR 260; *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372 at 391-393 per Romer J; *Secretary of State for India in Council v Foucar & Co* (1933) 61 LR Ind App 18, PC.

6 *Lopez v Muddun Mohun Thakoor* (1870) 13 Moo Ind App 467.

7 *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372; *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55 at 68-69 ('a rule which applies to a result and not to the manner of its production'). See also *Clarke v Edmonton City* [1929] 4 DLR 1010.

8 *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC (accretion caused by wind-blown sand).

9 *Re Hull and Selby Rly Co* (1839) 5 M & W 327; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC.

10 *Tilbury v Silva* (1890) 45 ChD 98; *Mercer v Denne* [1904] 2 Ch 534 (land added by accretion was held subject to the same custom for fishermen to dry their nets).

11 Bracton's de Legibus Bk 2 Ch 2, 68; *R v Lord Yarborough* (1828) 2 Bli NS 147 (gain of an average of five and a half yards per annum over 26 or 27 years properly held by a jury to be imperceptible); *A-G v M'Carthy* [1911] 2 IR 260 at 277; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC (observable movement of sand dunes said not to constitute observable movement of a land boundary out to sea so the judge was entitled to conclude movement was imperceptible). The reason for the requirement that the accretion be gradual or imperceptible was said in the latter case to be elusive (at 721 and 291) but it is clear that the distinction is drawn between progressions that justly belong to the riparian owner and large changes or avulsions that should more properly be allocated to his neighbour. If there are gradual and imperceptible accretions to the bank of a river then not only does the additional land accrete to the riparian owner but the boundary in the centre of the stream is automatically adjusted: *Foster v Wright* (1878) 4 CPD 438.

12 *Carlisle Corpn v Graham* (1869) LR 4 Exch 361 at 368. In such a case, the soil under the new tidal river channel remains the property of the original owner, so that if the river reverts to its original course, the soil of

the new channel becomes again the exclusive property of that owner: see WATER AND WATERWAYS vol 100 (2009) PARA 71.

13 *Ford v Lacy* (1861) 7 H & N 151; *Thakurain Ritraj Koer v Thakurain Sarfaraz Koer* (1905) 21 TLR 637.

14 See eg *Baxendale v Instow Parish Council* [1982] Ch 14, [1981] 2 All ER 620 (note that in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, [1982] 1 All ER 283, PC, no opinion was expressed on the correctness or otherwise of this decision). See also *Nesbitt v Mablethorpe UDC* [1918] 2 KB 1, CA.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(1) EVIDENCE FROM THE TITLE/927. Primary evidence in the documents of title.

2. EVIDENCE OF BOUNDARIES

(1) EVIDENCE FROM THE TITLE

927. Primary evidence in the documents of title.

Evidence of boundaries differs in kind and in degree. The title deeds of the parties concerned constitute the primary evidence and must be considered first[1]; and the boundaries as indicated in the title deeds prevail if they are clear and unambiguous[2]. The construction of a deed is a matter for the court, but in certain limited circumstances extrinsic evidence may be admissible to assist the court[3]. In the absence of clear evidence in the title deeds, the court may be guided by the applicable presumptions, if any[4]; evidence may be brought to rebut those presumptions[5] but, in the absence of evidence to displace them, those presumptions will apply[6].

As a general rule, where a deed refers to known physical and natural objects by means of which the boundaries of land conveyed are described, and also contains a statement of area, the former controls the latter in case of discrepancy[7]; and if reference is made to some physical object not in existence at the time, and the parties subsequently erect some object intending it to conform to the deed, the boundary indicated by that object is binding upon them, even though it may not actually conform to the line of boundary or to the acreage contained in the deed[8].

1 As to the disclosure of documents see para 915 note 10 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

2 See para 904 ante.

3 As to the admissibility of extrinsic evidence see para 929 post. As to the interpretation of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

4 See paras 916-926 ante.

5 *Duke of Beaufort v Swansea Corpn* (1849) 3 Exch 413; *Hale v Norfolk County Council* [2001] Ch 717, CA.

6 *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL.

7 *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Manning v Fitzgerald* (1859) 29 LJEx 24; *Lyle v Richards* (1866) LR 1 HL 222. See also para 904 ante. As to the effect of inaccuracy see para 907 ante.

8 See *Taylor v Parry* (1840) 1 Man & G 604. Cf *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(1) EVIDENCE FROM THE TITLE/928. Conflicting descriptions in the deeds.

928. Conflicting descriptions in the deeds.

Generally, all words and parts of a deed conveying property are relevant to the ascertainment of the property's boundaries but where a deed contains a sufficient and ascertained description of the property and also a false description[1], the false description is rejected as surplusage under the maxim *falsa demonstratio non nocet cum de corpore constat*[2]. However, where the principal words of the description lack the certainty necessary for the rejection of the subordinate description as a *falsa demonstratio* and the subordinate description can be read as limiting the principal description, the deed will be construed accordingly[3]. Thus if premises are described in general terms and a particular description is added, the latter controls the former[4].

If the description of the land intended to be conveyed is couched in such ambiguous terms that it is doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one of which would make the quantity conveyed agree with the quantity mentioned in the deed, while the other would make the quantity altogether different, the former construction must prevail[5].

1 Eg an inaccurate description of abuttals (*Francis v Hayward* (1882) 22 ChD 177, CA; *Mellor v Walmesley* [1905] 2 Ch 164, CA) or of occupancy (*Wilkinson v Malin* (1832) 2 Cr & J 636); or an inaccurate boundary used on a plan (*Maxted v Plymouth Corpn* [1957] CLY 243, CA). The description which is rejected as false need not follow the true description; the whole description must be looked at fairly to see what are the leading words of description and what is the subordinate matter: *Hardwick v Hardwick* (1873) LR 16 Eq 168 at 175 per Lord Selborne LC. See also *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Manning v Fitzgerald* (1859) 29 LJEx 24. As to inaccurate descriptions see also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 226 et seq.

2 Ie a false description does not vitiate when the subject matter is clear: see *Jack v McIntyre* (1845) 12 Cl & Fin 151, HL (where boundaries defined were held not to be limited by a specific reference to part of land situated within them); *Anstee v Nelms* (1856) 1 H & N 225 (where the description of the situation was wrong as regards the county, but right as regards the parish and otherwise); *White v Birch* (1867) 36 LJCh 174 (where a wrong description of land as 'in my own occupation' was rejected as *falsa demonstratio*); *Eastwood v Ashton* [1915] AC 900 at 912, HL; but cf *Re Seal, Seal v Taylor* [1894] 1 Ch 316, CA (where the words 'as the same are now occupied by me' in a will were construed as limiting the parcels). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 227-228; and as to the interpretation of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

3 See *Slingsby v Grainger* (1859) 7 HL Cas 273 at 283 per Lord Chelmsford LC; *Boyle v Mulholland* (1860) 10 ICLR 150.

4 *Doe d Smith v Galloway* (1833) 5 B & Ad 43; *Travers v Blundell* (1877) 6 ChD 436, CA; *Herrick v Sixby* (1867) LR 1 PC 436; *Re Seal, Seal v Taylor* [1894] 1 Ch 316, CA; *Re Brocket, Dawes v Miller* [1908] 1 Ch 185 at 196.

5 *Herrick v Sixby* (1867) LR 1 PC 436. The former rule that if a deed contained two conflicting descriptions that which came first in the deed prevailed (see *Dowtie's Case* (1584) 3 Co Rep 9b) does not appear to be the present law (see *Cowen v Truefitt Ltd* [1899] 2 Ch 309, CA; *Eastwood v Ashton* [1915] AC 900, HL), save perhaps in the rare case where the two descriptions are both of sufficient and equal certainty (see eg *Roe v Lidwell* (1859) 11 ICLR 320). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 228.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(1) EVIDENCE FROM THE TITLE/929. Admissibility of extrinsic evidence.

929. Admissibility of extrinsic evidence.

Extrinsic evidence is not admissible to contradict, vary or add to the terms of a deed[1] but only to put before the court the same knowledge of the subject matter of the deed as was in the possession of the parties to it at the time of its execution[2]. It may also be admitted where the

description of the boundaries of a property is too general, contradictory, uncertain or ambiguous[3], and the ambiguity is latent[4]. Thus where the parcels are approximate and a plan is referred to for identification only, the court can look at, and accept, a boundary where it has been physically marked on the ground and agreed by the parties[5]; where a transfer, read as a whole, cannot be reconciled with the line on a small scale plan, the court may admit in evidence auction particulars which clarify where the boundary is meant to be drawn[6]; and where a plan attached to a transfer is entirely unclear, the court may look at all the relevant documentation including replies to preliminary inquiries[7]. Extrinsic evidence has also been admitted in the case of a demise of land by admeasurement 'with the houses now erected or being erected thereon', to show that the foundations of the houses were actually laid at the date of the demise and extended beyond the limits of the boundaries shown on the plan, with the result that the admeasurements and plan were rejected as *falsa demonstratio*[8]. Where the extent of a grant of land is stated in an ambiguous manner in a conveyance or transfer, it is legitimate to interpret the deed by the extent of the user or possession which subsequently proceeded upon it[9], but no amount of user will prevail against the plain meaning of words[10]. Within these limits, evidence of user prior to a grant is also admissible to show what was intended to pass thereby[11].

Where an owner divides his land into parts and conveys each part to a different person, the court, in seeking to determine the boundaries defined by one of the conveyances, may admit the other conveyances in evidence to assist in resolving an ambiguity[12].

Where an agreement refers specifically to a plan, oral evidence is admissible to identify the plan referred to, but where there is no clear evidence to show what particular plan was agreed upon and there is no sufficient verbal description of the boundaries, the agreement is void for uncertainty[13]. However, where a plan forms part of a conveyance, for example where it is drawn on or bound up inside the conveyance, the fact that the plan is not referred to in the conveyance does not necessarily oblige the court to disregard the plan[14].

Extrinsic evidence is not admissible to contradict or vary clear descriptions of boundaries. Thus if a deed contains a full description of the land, evidence that a strip of land not included in the description was always occupied by the owner of the land undoubtedly conveyed by the deed is not admissible to contradict the deed[15]. Similarly, if the court is satisfied that the description and plan taken together clearly delimit the boundary, extrinsic evidence to show that the parties agreed the boundary to be other than that shown on the plan is not admissible[16]. Where two leases of adjoining properties were renewed by reference to the same plans as were incorporated in the original leases the parties were held to be bound by the terms of the renewed leases, despite an agreement made prior to the renewal by both tenants and their landlord that a strip of land forming part of the land demised by one of the original leases should be transferred to the other tenant[17].

Where there is no ambiguity in the descriptions contained in a deed, evidence to show that it was intended to convey more than appears in the description does not become admissible merely because a further description is added with which the subject matter clearly intended to be conveyed does not agree[18].

1 *Smith v Doe d Earl of Jersey* (1821) 2 Brod & Bing 473 at 541, HL, per Park J; *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA; *Scarfe v Adams* [1981] 1 All ER 843, CA. If a deed does not show the true boundary as intended between vendor and purchaser but its terms are clear, then the only remedy is by way of rectification of the transfer: *Scarfe v Adams* supra at 851. See also *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18, CA. As to rectification see MISTAKE vol 77 (2010) PARA 57 et seq.

2 *Murly v M'Dermott* (1838) 8 Ad & El 138; *Baird v Fortune* (1861) 4 Macq 127; *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 98, PC; *Shannon Ltd v Venner Ltd* [1965] Ch 682, [1965] 1 All ER 590, CA; *Ward v Gold* (1969) 211 EG 155; *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635; *Toplis v Green* [1992] EGCS 20, CA; *Targett and Targett v Ferguson and Diver* (1996) 72 P & CR 106, CA; cf *Doe d Preedy v Holtom* (1835) 4 Ad & El 76. As to the admissibility of extrinsic evidence generally see DEEDS AND

OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185 et seq; and as to the interpretation of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

3 *Doe d Gore v Langton* (1831) 2 B & Ad 680 at 691-692 (where property was conveyed with the 'hereditaments thereunto belonging' and extrinsic evidence was admitted to show the boundaries of such hereditaments); *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 (where property was conveyed by name and parol evidence was admitted to connect property with that name); *Lister v Pickford* (1865) 34 Beav 576; *Neilson v Poole* (1969) 20 P & CR 909 (conveyance with plan annexed was uncertain so extrinsic evidence was admitted); *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635; *Scarfe v Adams* [1981] 1 All ER 843, CA; *Mayer v Hurr* (1983) 49 P & CR 56, CA (the plan on a conveyance was on too small a scale to show the precise boundary and the colouring on the plan did not accord with the features on the site thus creating an ambiguity); *Haynes v Brassington* [1988] EGCS 100, CA. Cf *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA (as a matter of construction the deed was clear, certain and unambiguous so there was no room for evidence about the inconvenient consequences of the result); *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA (a plan for the purposes of identification only clearly showed the line of the boundary; extrinsic evidence was inadmissible); and see the text and note 16 infra. See also notes 5-7 infra.

4 *Lyle v Richards* (1866) LR 1 HL 222 at 239 per Lord Westbury; *Goodtitle d Radford v Southern* (1813) 1 M & S 299 at 301.

5 *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635; *Neilson v Poole* (1969) 20 P & CR 909. Cf *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA (a plan stated to be 'for purposes of identification only' can be used to determine where a boundary lies, and if a conveyance is then clear as to the position of the boundary line, extrinsic evidence is not admissible).

6 *Scarfe v Adams* [1981] 1 All ER 843, CA.

7 See *Toplis v Green* [1992] EGCS 20, CA.

8 *Manning v Fitzgerald* (1859) 29 LJEx 24. See para 928 ante.

9 *Watcham v A-G of the East Africa Protectorate* [1919] AC 533 at 540, PC, as explained and limited as an exception in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL, which confirmed the general rule in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL, that an agreement cannot be construed in the light of the subsequent actions of the parties. Thus it is only in the case of descriptions of property that ambiguities in modern instruments can be resolved by evidence of later use or possession: *Watcham v A-G of the East Africa Protectorate* supra; *Neilson v Poole* (1969) 20 P & CR 909 (evidence from subsequent conveyances was admitted); *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572 (affd [1975] 1 All ER 772, [1975] 1 WLR 468, CA). See, however, the varying degrees of reservation expressed in the speeches delivered in *L Schuler AG v Wickman Machine Tool Sales Ltd* supra. The permissibility of having regard to subsequent conveyances was expressly left open in *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 at 446, [1978] 1 WLR 1462 at 1475, CA, per Buckley LJ. Where boundaries depend upon the construction of an ancient grant, ie dating from beyond the time of living memory, evidence of modern usage may assist (in accordance with the wider general rule and the presumption *omnia praesumuntur rite esse acta*) in the case of doubt or ambiguity in relation to questions such as whether an ancient grant of a manor included the sea coast down to low water mark (*Calmady v Rowe* (1844) 6 CB 861; *Duke of Beaufort v Swansea Corpn* (1849) 3 Exch 413; *A-G v Jones* (1862) 2 H & C 347; *Le Strange v Rowe* (1866) 4 F & F 1048; *A-G for Ireland v Vandeleur* [1907] AC 369, HL), whether the words 'river L' in an ancient patent comprised the riverbed so far or not so far as the sea (*Marquis of Donegall v Lord Templemore* (1858) 9 ICLR 374; *Re Belfast Dock Act 1854, ex p Earl of Ranfurly* (1867) IR 1 Eq 128), and whether a castle was within the boundary of a county hundred (*Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273). As to the construction of ancient grants see further CUSTOM AND USAGE.

10 *North Eastern Rly Co v Lord Hastings* [1900] AC 260 at 263, HL, per Lord Halsbury LC; *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 97, PC.

11 *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 98, PC; *Mayer v Hurr* (1983) 49 P & CR 56, CA; cf *Curtis v Chamberlain* (1969) 212 EG 277, CA.

12 *Neilson v Poole* (1969) 20 P & CR 909; *Druce v Druce* (25 April 2002) Lexis, Enggen Library, Cases File, ChD.

13 *Hodges v Horsfall* (1829) 1 Russ & M 116.

14 *Leachman v L and K Richardson Ltd* [1969] 3 All ER 20, [1969] 1 WLR 1129, distinguishing *Wyse v Leahy* (1875) IR 9 CL 384. In the case of dealings with only part of the land comprised in a registered title, the instrument must be accompanied by a plan signed by the grantor and by or on behalf of the grantee unless

such part is clearly defined on the filed plan of the land in which case it may be defined by reference to the filed plan: see the Land Registration Rules 1925, SR & O 1925/1093, rr 79, 113 (both as amended); and LAND REGISTRATION.

15 *Barton v Dawes* (1850) 10 CB 261; *Boyle v Mulholland* (1860) 10 ICLR 150; *Webber v Stanley* (1864) 16 CBNS 698 at 752; *Smith v Ridgway* (1866) LR 1 Exch 331; *Pedley v Dodds* (1866) LR 2 Eq 819 (where a devise of a farm 'in the parish of R' was held not to include lands in other parishes previously occupied with the same farm); *Curtis v Chamberlain* (1969) 212 EG 277, CA.

16 *Woolls v Powling* (10 June 1999) Lexis, Enggen Library, Cases File, CA.

17 *Curtis v Chamberlain* (1969) 212 EG 277, CA.

18 *Goodtitle d Radford v Southern* (1813) 1 M & S 299 at 301; *Dublin and Kingstown Rly Co v Bradford* (1857) 7 ICLR 624; *Doe d Smith v Galloway* (1833) 5 B & Ad 43; *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Roe v Lidwell* (1859) 11 ICLR 320; *Doe d Renow v Ashley* (1847) 10 QB 663. See also para 928 ante.

UPDATE

929 Admissibility of extrinsic evidence

NOTE 9--See *Ali v Lane* [2006] EWCA Civ 1532, (2006) Times, 4 December (extraneous evidence permissible, but must be of probative value in determining what parties to original conveyance intended).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(i) Acts of the Parties/930. Agreement for sale.

(2) PARTICULAR KINDS OF EVIDENCE

(i) Acts of the Parties

930. Agreement for sale.

An agreement for the sale of property is not sufficient to fix boundaries, nor, as between the purchaser and the vendor (except in an action for rectification), is the agreement in general evidence for the purpose of proving the boundaries of the property subsequently conveyed by deed, for the agreement is merged in the deed[1]. However, a contract which includes a draft transfer showing the land to be transferred binds the vendor to convey the property so delineated[2].

Particulars of sale at an auction at which property was sold have been admitted as evidence of boundaries[3] where the conveyance was ambiguous[4], and to rebut the presumption that the ownership of a several fishery in a river carries with it the ownership of the bed of the river[5]. Answers to preliminary inquiries have also been admitted as evidence of boundaries[6].

1 *Williams v Morgan* (1850) 15 QB 782; and see DEEDS AND OTHER INSTRUMENTS. Cf *Willson v Greene (Moss, third party)* [1971] 1 All ER 1098, [1971] 1 WLR 635 (evidence of pre-contract negotiations in respect of a boundary admitted where the parcels in a conveyance were vague and the plan expressed to be for identification purposes only); and see para 929 ante. As to the admissibility of an agreement or of parol evidence to correct or vary the terms of a deed in a claim for rectification see *Murray v Parker* (1854) 19 Beav 305. As to rectification see MISTAKE vol 77 (2010) PARA 57 et seq.

2 *Seabreeze Properties Ltd v Haw* [1990] EGCS 114 (specific performance ordered of a contract where the draft transfer included a plan with the land 'edged red'; an action to rectify failed).

3 Eg to rebut the presumption relating to hedges and ditches: *Falkingham v Farley* (1991) Times, 11 March, CA.

4 *Scarfe v Adams* [1981] 1 All ER 843, CA. See also para 929 ante.

5 *Ecroyd v Coulthard* [1897] 2 Ch 554; affd [1898] 2 Ch 358, CA. As to the principles on which extrinsic evidence is admissible in such circumstances see paras 916, 929 ante. As to the presumption see para 924 ante.

6 *Toplis v Green* [1992] EGCS 20, CA.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(i) Acts of the Parties/931. Acts of ownership.

931. Acts of ownership.

Evidence of acts of ownership is admissible on an issue as to the title or boundaries to property[1]. Under this rule, evidence has been admitted of such acts as fishing a river or pond[2], felling a tree[3], preventing persons from trespassing[4], maintaining a ditch[5], and perambulation of a manor by the lord, even in the absence of anyone on behalf of the rival claimant[6].

Ancient documents coming from the proper custody[7] and purporting on the face of them to show exercise of ownership, such as leases[8], licences in the nature of leases[9], or documents showing that a person in possession is vindicating that possession against someone else[10], are also admissible under this rule. In the case of a lease the payment of rent is an additional fact equally admissible[11], but proof of such payment is not essential to the lease being admitted[12].

However, such acts of ownership as clipping, trimming and pollarding a hedge or cleaning a ditch, though admissible in evidence, are not conclusive as to the title to the hedge or ditch where the presumption of law is to the contrary[13]. Though acts done upon one part of land within a clearly defined boundary may be evidence of the ownership of the whole land within such boundary[14], where there is a disputed strip of land on a boundary, acts of ownership by either party on land outside the disputed strip are no evidence of title to the land within it[15].

1 *Curzon v Lomax* (1803) 5 Esp 60 (where it was said that to prove a right to the soil, acts of ownership exercised by one party were conclusive evidence against a supposed title from presumptive evidence of boundaries which had never been ascertained by possession); *Stanley v White* (1811) 14 East 332 (evidence of acts of ownership in one part of a belt of trees could be evidence of the same right throughout the whole). See *Jones v Williams* (1837) 2 M & W 326, where the question was whether the middle or one side of a stream was the boundary between two properties, and evidence of acts of ownership was admitted to prove the second proposition; and cf para 924 ante. See also *University College, Oxford v Oxford Corpn* (1904) 20 TLR 637. As to acts of ownership see also CIVIL PROCEDURE vol 11 (2009) PARA 1071.

2 *A-G v Emerson* [1891] AC 649, HL; *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602; *Carlisle Corpn v Graham* (1869) LR 4 Exch 361; *Ecroyd v Coulthard* [1897] 2 Ch 554 (affd [1898] 2 Ch 358, CA). As to the presumption of ownership in such cases see paras 923-924 ante.

3 *Doe d Stansbury v Arkwright* (1833) 2 Ad & El 182n; *Lord St Leonards v Ashburner* (1870) 21 LT 595.

4 *Brew v Haren* (1874) IR 9 CL 29 (affd (1877) IR 11 CL 198); *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL.

5 *Hall v Dorling* (1996) 74 P & CR 400, CA.

6 *Woolway v Rowe* (1834) 1 Ad & El 114. Perambulation was, in former times, one of the ways of ascertaining and preserving not only public boundaries, such as those of parishes, towns, counties and forests, but also quasi-private boundaries, eg of seigniories, lordships and manors. A perambulation of a hundred was

not usual; but there was no reason why a hundred, as well as a parish or manor, should not thus have its bounds ascertained: *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 407, CA, per Cozens-Hardy MR. See Vin Abr Perambulation. As to parish boundary perambulations see *Weeks v Sparke* (1813) 1 M & S 679 at 687, 689; *Taylor v Devey* (1837) 7 Ad & El 409. As to perambulations see CUSTOM AND USAGE vol 12(1) (Reissue) para 640. As to the boundaries of ecclesiastical parishes see ECCLESIASTICAL LAW vol 14 para 534 et seq; and as to the boundaries of parishes as units of local government see LOCAL GOVERNMENT vol 69 (2009) PARAS 27 et seq, 70 et seq. It is not clear whether the perambulation of a private estate was ever made.

7 As to the presumption of the authenticity of a document more than 20 years old produced from proper custody see *Doe d Oldham v Wolley* (1828) 8 B & C 22; and CIVIL PROCEDURE vol 11 (2009) PARA 869. See also para 935 post.

8 *Malcolmson v O'Dea* (1863) 10 HL Cas 593 at 614; *Bristow v Cormican* (1878) 3 App Cas 641 at 653, HL (boundaries of a private fishery); *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, CA.

9 *Rogers v Allen* (1808) 1 Camp 309; *Malcolmson v O'Dea* (1863) 10 HL Cas 593 at 614.

10 *Blandy-Jenkins v Earl of Dunraven* [1899] 2 Ch 121 at 125, CA. As to the value of acts of ownership in support of ancient documents see also *Hastings Corpn v Ivall* (1874) LR 19 Eq 558; *Bristow v Cormican* (1878) 3 App Cas 641, HL; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770 at 791, HL (where the title to the foreshore was evidenced partly by grant and partly from acts of ownership); *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL (where possession of a fishery was evidenced by the production of, inter alia, a report of certain ancient proceedings in court in a possessory action).

11 *Bristow v Cormican* (1878) 3 App Cas 641, HL.

12 *Malcolmson v O'Dea* (1863) 10 HL Cas 593.

13 *Henniker v Howard* (1904) 90 LT 157, DC; *Earl of Craven v Pridmore* (1902) 18 TLR 282, CA. See also *Simcox v Yardley RDC* (1905) 69 JP 66; *Minting v Ramage* [1991] EGCS 12, CA. As to the presumptions of law see paras 918-919 ante.

14 *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL; *Hanbury v Jenkins* [1901] 2 Ch 401 at 417. The erection and maintenance of piles on a portion of a foreshore is an act of ownership only as regards the particular portion of the foreshore upon which the piles stand: *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602 at 603.

15 *Clark v Elphinstone* (1880) 6 App Cas 164, PC (latent ambiguity in description of boundary). Cf *Doe d Barrett v Kemp* (1831) 7 Bing 332; *Tutill v West Ham Board of Health* (1873) LR 8 CP 447; *Leeke v Portsmouth Corpn* (1912) 107 LT 260.

(ii) Hearsay Evidence

932. The principle of admissibility.

The Civil Evidence Act 1995 provides that in civil proceedings[1] evidence must not be excluded on the ground that it is hearsay[2]. This principle means that many of the former difficulties in bringing evidence of historic boundaries where the deeds are not clear have been resolved[3].

A party wishing to adduce hearsay evidence in a boundary dispute must give to the other party such notice of that fact and, on request, such particulars relating to the evidence as is reasonable and practicable in the circumstances for the purpose of enabling any matters arising from its being hearsay to be dealt with[4]. It is for the court to estimate the weight to be given to the hearsay evidence, having regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence[5].

1 For these purposes, 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties: see the Civil Evidence Act 1995 s 11; and CIVIL PROCEDURE vol 11 (2009) PARA 808.

2 See ibid s 1(1); and CIVIL PROCEDURE vol 11 (2009) PARA 808. Hearsay means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated: see s 1(2)(a); and CIVIL PROCEDURE vol 11 (2009) PARA 808.

3 See further CIVIL PROCEDURE.

4 See the Civil Evidence Act 1995 s 2(1); and CIVIL PROCEDURE vol 11 (2009) PARA 811.

5 See ibid s 4(1); CIVIL PROCEDURE vol 11 (2009) PARA 815. As to the matters to which the court is to have particular regard in weighing the evidence see s 4(2); and CIVIL PROCEDURE vol 11 (2009) PARA 815.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(ii) Hearsay Evidence/933. Evidence formerly admissible at common law.

933. Evidence formerly admissible at common law.

The common law exceptions to the rule against the admissibility of hearsay evidence in civil proceedings were effectively preserved by the Civil Evidence Act 1968[1]. Though the common law rule relating to the admissibility of admissions adverse to a party has been superseded[2], the Civil Evidence Act 1995 provides that other common law rules relating to admissibility are to continue to have effect[3] and are not altered but only identified and preserved by the statutory provisions[4].

1 See the Civil Evidence Act 1968 s 9(1), (2) (repealed).

2 See the Civil Evidence Act 1995 s 7(1); and CIVIL PROCEDURE vol 11 (2009) PARAS 819, 825.

3 See ibid s 7(2), (3); and CIVIL PROCEDURE vol 11 (2009) PARAS 820-823.

4 See ibid s 7(4); and CIVIL PROCEDURE vol 11 (2009) PARA 820. As to the preserved common law rules as they relate to boundaries see paras 934-937 post.

In many cases, such as statements from public documents, the evidence will also be admissible under the provisions and procedures of the Civil Evidence Act 1995 itself (see eg s 9; and para 936 post), but the advantage of admission under the preserved common law rules is that the notice and weighting provisions (ie ss 2, 4: see para 932 ante) do not apply.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(ii) Hearsay Evidence/934. Published works.

934. Published works.

Under the preserved common law rule[1], published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible in civil proceedings[2] as evidence of facts of a public nature stated in them[3]. Thus standard atlases and maps may be used to prove facts of public knowledge[4].

An ordnance survey map to which no reference is made in the title deeds[5] is not admissible[6] to show the boundary of a parish[7] or the boundary between the lands of adjoining owners[8], because when power was conferred to complete the ordnance survey of Great Britain it was expressly provided that this power was not to extend to the ascertaining or alteration of local or private boundaries and that titles to land were not to be affected[9]. However, an ordnance survey map may be received in evidence[10] to show the position of the median line of a river[11] or of some physical object existing at the time the map was made[12], such as the existence or otherwise of a track across land[13].

A county history giving the boundaries of a county was not admissible under the common law rule as evidence of the boundaries of a manor even though they were admittedly coterminous in part with the boundaries of the county[14].

A book of general history may be given in evidence to ascertain ancient facts of a public nature[15] but not particular customs or private rights[16].

1 As to the preservation of the common law rule see note 3 infra; and para 933 ante.

2 For the meaning of 'civil proceedings' see para 932 note 1 ante.

3 See the Civil Evidence Act 1995 s 7(2)(a); and CIVIL PROCEDURE vol 11 (2009) PARA 820. Section 7(2)(a) provides that the common law rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(b) (repealed) is to continue to have effect after the repeal of that Act. See also para 933 ante; and CIVIL PROCEDURE.

4 In *R v Orton* (1874) Stephen's Digest of the Law of Evidence (12th Edn) p 56, maps of Australia were given in evidence to show the situation of places where the defendant said he had lived. In *Birrell v Dryer* (1884) 9 App Cas 345 at 352, HL, per Lord Blackburn, the court accepted an Admiralty chart as evidence. As to maps and plans as evidence see further para 939 post.

5 See *Wakeman v West* (1836) 7 C & P 479 (old leases produced from bishop's registry read in evidence but an old map produced from the same custody but not referred to therein was not admissible under the common law rule). See, however, para 932 ante. See also *Plaxton v Dare* (1829) 10 B & C 17 (ancient leases admissible as evidence of a parish boundary).

6 Ie under the preserved common law rule: see the text and notes 1-3 supra. Nor is it admissible under the preserved common law rules relating to public documents (see para 935 post) or evidence of reputation (see para 937 post). See, however, para 932 ante.

7 *Bidder v Bridges* (1885) 54 LT 529.

8 *Tisdall v Parnell* (1863) 14 ICLR 1 at 27-28; *Coleman v Kirkaldy* [1882] WN 103. See *Swift v M'Tiernan* (1848) 11 I Eq R 602; *Mercer v Denne* [1905] 2 Ch 538, CA.

9 See the Ordnance Survey Act 1841 s 12 (as amended); para 905 ante; and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1117. As to ordnance survey maps as evidence see further NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1111.

10 Ie under the Civil Evidence Act 1995 s 7(2)(a): see the text and note 3 supra.

11 *Great Torrington Commons Conservators v Moore Stevens* [1904] 1 Ch 347 at 353.

12 *A-G and Croydon RDC v Moorsom-Roberts* (1908) 72 JP 123; *Caton v Hamilton* (1889) 53 JP 504.

13 *A-G v Antrobus* [1905] 2 Ch 188 at 203; *A-G v Meyrick and Jones* (1915) 79 JP 515; *Minting v Ramage* [1991] EGCS 12, CA (1838 tithe map admitted to determine whether a highway then existed across a common).

14 *Evans v Getting* (1834) 6 C & P 586; *White and Jackson v Beard* (1839) 2 Curt 480 at 487, 492.

15 *Read v Bishop of Lincoln* [1892] AC 644, PC. See also *White and Jackson v Beard* (1839) 2 Curt 480 at 492 (boundaries of a parish).

16 *Evans v Getting* (1834) 6 C & P 586 at 587n. See also CIVIL PROCEDURE vol 11 (2009) PARA 941.

935. Public documents.

Public documents[1] (for example, public registers and returns made under public authority with respect to matters of public interest) are admissible in civil proceedings[2] as evidence of facts stated in them[3]. The extent to which statements in public documents are admissible to prove any particular facts stated depends on the nature of the document and the objects for which it was drawn up.

The Domesday Book is a record of a public inquisition or survey, and therefore admissible as evidence of boundaries[4].

A Crown survey, if made under proper authority, as, for example, pursuant to an Act of Parliament, with the intent that it should be open to public inspection, and produced from the records of the court or other proper custody, is also admissible as a public document in questions of boundary[5], even where the commission under which it was made is lost, provided that there is evidence that the survey was made under due authority[6].

Surveys which are not made under proper authority[7] or with the intent that they should be open to public inspection[8] are treated merely as private memorials and are not admissible in evidence as public documents[9]. This rule applies to surveys made on behalf of the Crown when it is beneficially interested[10].

Tithe commutation maps are public documents[11] and are admissible in evidence provided that: (1) the question to be determined is one relating to public or general rights as opposed to private rights[12]; and (2) the matter of fact sought to be determined is one within the duty of the commissioners or valuers who prepared them[13]. Inclosure awards[14] are similarly admissible[15] and may be particularly valuable on the issue of the boundaries of highways laid out under or by virtue of such awards.

Entries in the court rolls of manorial courts are also public documents[16] and the contents may be admissible as such as evidence of any fact stated therein, though such evidence was not always usable by the lord in proof of the boundaries of his manor[17].

Documents not less than 20 years old, produced from proper custody, are presumed to be validly executed or published[18].

1 As to the meaning of 'public document' see *Sturla v Freccia* (1880) 5 App Cas 623 at 643, HL, per Lord Blackburn ('a public document ... is made for the purpose of the public making use of it and being able to refer to it'). See also *Thrasyvoulos Ioannou v Papa Christoforos Demetriou* [1952] AC 84 at 94, [1952] 1 All ER 179 at 185-186, PC; *R v Sealby* [1965] 1 All ER 701.

2 For the meaning of 'civil proceedings' see para 932 note 1 ante.

3 See the Civil Evidence Act 1995 s 7(2)(b); and CIVIL PROCEDURE vol 11 (2009) PARA 821. Section 7(2)(b) provides that the common law rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(c) (repealed) is to continue to have effect after the repeal of that Act. See also para 933 ante; and CIVIL PROCEDURE. For details of the rule relating to public documents see *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641, HL; *Sturla v Freccia* (1880) 5 App Cas 623, HL; and CIVIL PROCEDURE vol 11 (2009) PARA 902 et seq.

4 The Domesday Book was compiled by royal commissioners shortly after the Norman conquest. It contains a general survey of most of the counties in England, and specifies the name and local position of every place, its possessor at the time of King Edward the Confessor and at the time of the survey, together with particulars, quantities and descriptions of the land. Its value as evidence is obviously limited by the difficulty usually experienced of applying the ancient descriptions to modern circumstances. In *Alcock v Cooke* (1829) 5 Bing 340

and *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602, extracts from the Domesday Book were given in evidence.

5 *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA (where the survey was made in discharge of a public duty imposed by statute). See *Doe d William IV v Roberts* (1844) 13 M & W 520 (ancient survey of extent of Crown lands); *New Romney Corpn v New Romney Sewers Comrs* [1892] 1 QB 840, CA (map made under the authority of a royal commission).

6 *Rowe v Brenton* (1828) 8 B & C 737 at 747. See *Smith v Earl Brownlow* (1870) LR 9 Eq 241 at 252. See also the Civil Evidence Act 1995 s 8; and CIVIL PROCEDURE vol 11 (2009) PARA 816.

7 *Evans v Taylor* (1838) 7 Ad & El 617 (where a survey of the boundaries of a manor purporting to be made under the statute Extenta Manerii (temp incert), which gave no power to define boundaries of manors, was held not to be admissible as evidence of a boundary, either as a public document or on the ground of reputation); *Mercer v Denne* [1905] 2 Ch 538, CA (where a map in the possession of the Admiralty, not being an Admiralty chart, was held not to be admissible).

8 *Thrasyvoulos Ioannou v Papa Christoforos Demetriou* [1952] AC 84, [1952] 1 All ER 179, PC.

9 Vin Abr Evidence A b 15, s 12; *Daniel v Wilkin* (1852) 7 Exch 429; *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349. They may be admissible by applying the general principle (see para 932 ante) or on other common law grounds, eg as evidence of reputation (see *Freeman v Read* (1863) 4 B & S 174, where a parliamentary survey made in the time of the Commonwealth was admitted as good evidence; and para 937 post) or records (see *Mellor v Walmesley* [1905] 2 Ch 164, CA; and para 936 post).

10 *Phillips v Hudson* (1867) 2 Ch App 243 (survey made by Augmentation Office for the purposes of the Crown as a private owner); *Mercer v Denne* [1905] 2 Ch 538, CA. Cf *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA, where a surveyor's report made under 34 Geo 3 c 75 (1794) s 8 (repealed) (an Act for the Better Management of the Land Revenue of the Crown) was held to be a public document and admissible in evidence.

11 *Giffard v Williams* (1869) as reported in 38 LJCh 597 at 604; revsd on other grounds (1870) 5 Ch App 546. The actual admission of the tithe map as evidence of private title in that case appears to have been wrong: see *Wilberforce v Hearfield* (1877) 5 ChD 709. Tithe maps are either first class, that is, identified by the Tithe Commissioner's seal, or second class, which indicates that there was some failure to satisfy all the stringent requirements. Both have been admitted in evidence: *Smith v Lister* (1895) 64 LJQB 154; *A-G v Antrobus* [1905] 2 Ch 188 at 193-194.

12 *Knight v David* [1971] 3 All ER 1066, [1971] 1 WLR 1671; *Wilberforce v Hearfield* (1877) 5 ChD 709; *Frost v Richardson* (1910) 103 LT 22 (affd 103 LT 416, CA). In *Smith v Lister* (1895) 64 LJQB 154, such a map was received in evidence as to the waste of a manor. Cf *Hammond v Bradstreet* (1854) 10 Exch 390 at 395. The provision in the Tithe Act 1836 s 64 (as amended; now spent) for such maps and confirmed apportionments to be satisfactory, ie conclusive, evidence was limited to their being satisfactory or conclusive for the purposes of that Act and was not intended to make them evidence of boundaries between private estates (*Wilberforce v Hearfield* supra) or even of public rights of way (*Copestake v West Sussex County Council* [1911] 2 Ch 331 at 341; *Stoney v Eastbourne RDC* [1927] 1 Ch 367 at 395-397, 407-408, CA, explaining *A-G v Antrobus* [1905] 2 Ch 188 at 193-194); *Kent County Council v Loughlin* (1975) 119 Sol Jo 528, CA (tithe map was treated as of great value and importance in determining whether a lane was a private street or a highway).

13 *Knight v David* [1971] 3 All ER 1066, [1971] 1 WLR 1671 (ascertainment of proprietorship held to be within the duty of the commissioners who prepared a tithe commutation map and the map held to be admissible at common law as a statement relating to public rights).

14 Ie made under the Inclosure Act 1801, the Inclosure Act 1845 or by virtue of a private or local Act: see COMMONS vol 13 (2009) PARA 418 et seq.

15 *A-G v Antrobus* [1905] 2 Ch 188 at 193; *Roberts v Webster* (1967) 66 LGR 298; *Fisons Horticulture Ltd v Bunting* (1976) 240 EG 625.

16 See the Law of Property Act 1922 s 144A (as added); the Manorial Documents Rules 1959, SI 1959/1399 (as amended); and CUSTOM AND USAGE vol 12(1) (Reissue) para 701.

17 *Irwin v Simpson* (1758) 7 Bro Parl Cas 306; *Standen v Chrismas* (1847) 10 QB 135. Such documents may be admissible by applying the general principle (see para 932 ante) or as acts or assertions of ownership (see para 931 ante) or as evidence of reputation (see para 937 post): *Roe d Beebee v Parker* (1792) 5 Term Rep 26; *Evans v Rees* (1839) 10 Ad & El 151; *Richards v Bassett* (1830) 10 B & C 657; *Coote v Ford* (1900) 17 TLR 58.

18 See the Evidence Act 1938 s 4; and CIVIL PROCEDURE vol 11 (2009) PARA 869.

936. Records.

Many documents which may assist in determining boundaries may be admissible by virtue of the Civil Evidence Act 1995, which provides that a document[1] which is shown to form part of the records[2] of a business[3] or public authority[4] may be received in evidence without further proof[5]. For a document to be taken to form part of the records of a business or public authority, a certificate to that effect signed by an officer[6] of the business or authority to which the records belong must be produced to the court[7].

Under the preserved common law rule[8], certain records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible in civil proceedings[9] as evidence of facts stated in them[10]. Thus extracts from former land tax or poor rate assessments, which are evidence of seisin, are admissible in boundary questions[11].

1 For these purposes, 'document' means anything in which information of any kind is recorded: Civil Evidence Act 1995 s 13.

2 For these purposes, 'records' means records in whatever form: ibid s 9(4). For the purposes of the Civil Evidence Act 1968 s 4 (repealed), it was held that records are those which a historian would regard as primary sources, that is, documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with a direct knowledge of the facts: *H v Schering Chemicals Ltd* [1983] 1 All ER 849 at 852, [1983] 1 WLR 143 at 146 per Bingham J (summaries of research were not records). See also *Re Koscot Interplanetary (UK) Ltd, Re Koscot AG* [1972] 3 All ER 829 (a compilation of the results of legal proceedings is probably not a record); *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 All ER 296, [1984] 1 WLR 271 (a statutory report containing a selection of evidence and expressing opinion in comments and conclusions was not a record); *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277 (all documents giving effect to a transaction were part of the record of it); *Re D (A Minor) (Wardship: Evidence)* [1986] 2 FLR 189 (notes taken by a solicitor to assist in the preparation of pleadings were not a record).

3 For these purposes, 'business' includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual: Civil Evidence Act 1995 s 9(4).

4 For these purposes, 'public authority' includes any public or statutory undertaking, any government department and any person holding office under Her Majesty: ibid s 9(4).

5 See ibid s 9(1); and CIVIL PROCEDURE vol 11 (2009) PARA 817. The court must estimate the weight to be given to such records in accordance with s 4: see para 932 ante.

The court may, having regard to the circumstances of the case, direct that all or any of the provisions of s 9 do not apply in relation to a particular document or record: s 9(5). This power is likely to be relevant where the court has doubts about the reliability of the record.

6 For these purposes, 'officer' includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records: ibid s 9(4).

7 See ibid s 9(2); and CIVIL PROCEDURE vol 11 (2009) PARA 817.

8 As to the preservation of the common law rule see note 10 infra; and para 933 ante.

9 For the meaning of 'civil proceedings' see para 932 note 1 ante.

10 See the Civil Evidence Act 1995 s 7(2)(c); and CIVIL PROCEDURE vol 11 (2009) PARA 822. Section 7(2)(c) provides that the common law rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(d) (repealed) is to continue to have effect after the repeal of that Act. See also para 933 ante; and CIVIL PROCEDURE.

11 *Doe d Smith v Cartwright* (1824) 1 C & P 218; *Plaxton v Dare* (1829) 10 B & C 17 (old rates made by parish officers on the occupiers of the land in question); *Doe d Stansbury v Arkwright* (1833) 2 Ad & El 182n;

Doe d Strode v Seaton (1834) 2 Ad & El 171; *Anstee v Nelms* (1856) 1 H & N 225 at 232-233. See also *Swift v M'Tiernan* (1848) 11 I Eq R 602.

937. Reputation.

Evidence of reputation[1], that is to say, of the common or general attribution to a person or thing of a particular feature, may be oral or documentary, so that deeds, leases and other private documents may be admitted as declaratory of their contents; and the evidence need not necessarily be supported by usage[2].

Under the preserved common law rule[3], evidence of reputation or family tradition is admissible in civil proceedings[4] for the purpose of proving or disproving the existence of any public[5] or general right or of identifying any person or thing[6]. Cases where the common law rule has been held to apply include those where the question related to the boundaries of a town[7], parish[8] or manor[9] or to the boundaries between counties, parishes, hamlets or manors[10], or between a reputed manor and land belonging to a private individual[11] or between old and new land in a manor[12].

General reputation may be admissible in proof of identification[13]. Thus the general repute existing in a testator's family or neighbourhood has been received to identify the subject matter of a demise[14].

At common law[15], evidence of reputation is inadmissible both as to particular facts as opposed to general rights[16] and in cases of a private nature[17], for example as to the boundaries between two private properties, except where the private boundaries coincide with public ones[18].

Where evidence of reputation is admissible, a private map made by a person having means of knowledge who has since died is admissible as such evidence, provided that the map is found in the proper custody and proof of the death of the maker of the map is furnished[19].

1 'Reputation is in general weak evidence and, when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be': *Weeks v Sparke* (1813) 1 M & S 679 at 687 per Lord Ellenborough CJ; but the rationale of receiving such evidence is that it may be the only evidence of the line of ancient boundaries. As to evidence of reputation see further *R v Bedfordshire Inhabitants* (1855) 4 E & B 535 at 541 per Lord Campbell CJ; *Morewood v Wood* (1791) 14 East 327 at 330; and CIVIL PROCEDURE vol 11 (2009) PARA 827 et seq.

2 *Crease v Barrett* (1835) 1 Cr M & R 919. See also CIVIL PROCEDURE.

3 As to the preservation of the common law rule see note 6 infra; and para 933 ante.

4 For the meaning of 'civil proceedings' see para 932 note 1 ante.

5 The word 'public' in this context was explained in *Mercer v Denne* [1905] 2 Ch 538 at 560, CA, per Vaughan Williams LJ. See also *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA; *Knight v David* [1971] 3 All ER 1066, [1971] 1 WLR 1671.

6 See the Civil Evidence Act 1995 s 7(3)(b)(ii); and CIVIL PROCEDURE vol 11 (2009) PARA 827. Section 7(3) provides that the common law rules effectively preserved by the Civil Evidence Act 1968 s 9(3), (4) (repealed) are to continue to have effect after the repeal of that Act. See also para 933 ante; and CIVIL PROCEDURE.

7 *Ireland v Powell* (1802) cited 7 Ad & El at 555 (where the question was whether a turnpike was within the boundary of a town); *R v Bliss* (1837) 7 Ad & El 550.

8 *R v Mytton* (1860) 2 E & E 557. See also *Coombs v Coether and Wheeler* (1829) Mood & M 398; *Cooke v Banks* (1826) 2 C & P 478; *Plaxton v Dare* (1829) 10 B & C 17.

9 *Doe d Jones v Richards* (1798) Peake Add Cas 180; *Talbot v Lewis* (1834) 6 C & P 603; *Doe d Padwick v Skinner* (1848) 3 Exch 84.

10 *Nicholls v Parker* (1805) 14 East 331n (boundaries of common; whether in parish and manor of A or parish and manor of B); *Thomas v Jenkins* (1837) 6 Ad & El 525; *Brisco v Lomax* (1838) 8 Ad & El 198 at 213 (boundaries of hamlet and private estate identical); *Evans v Rees* (1839) 10 Ad & El 151 (boundaries between parishes and counties).

11 *Doe d Molesworth v Sleeman* (1846) 9 QB 298, where declarations made by a person who had since died were admitted as to boundaries. As to declarations made by persons who have since died see para 938 post. See also *Curzon v Lomax* (1803) 5 Esp 60, where it was said that the right to the soil was evidenced by acts of ownership exercised on it, not by presumptive evidence of property arising from supposed boundaries the rights to which had never been ascertained by possession. As to acts of ownership see para 931 ante.

12 *Barnes v Mawson* (1813) 1 M & S 77 at 81 per Lord Ellenborough CJ.

13 See the Civil Evidence Act 1995 s 7(3)(b)(ii); and CIVIL PROCEDURE vol 11 (2009) PARA 827.

14 *Anstee v Nelms* (1856) 1 H & N 225.

15 As to the admissibility of hearsay evidence under the Civil Evidence Act 1995 s 1 see para 932 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 808.

16 *Outram v Morewood* (1793) 5 Term Rep 121 at 123 per Lord Kenyon CJ ('although a general right may be proved by traditionary evidence, yet a particular fact cannot'). Thus evidence is inadmissible to prove that a person, who has since died, planted a tree near a road and stated at the time of planting that his object was to show where the boundary of the road was when he was a boy (*R v Bliss* (1837) 7 Ad & El 550; and see *R v Berger* [1894] 1 QB 823, DC), or that a stone was erected as a boundary mark at a particular place (*R v Bliss* supra), or that perambulations had taken a particular line (*Taylor v Devey* (1837) 7 Ad & El 409). See also *Mercer v Denne* [1905] 2 Ch 538, CA. As to perambulations and other acts of ownership see para 931 ante.

17 See the Civil Evidence Act 1995 s 7(3)(b)(ii); and CIVIL PROCEDURE vol 11 (2009) PARA 827. See also *R v Bedfordshire Inhabitants* (1855) 4 E & B 535 at 542.

18 *Thomas v Jenkins* (1837) 6 Ad & El 525; *Brisco v Lomax* (1838) 8 Ad & El 198 at 213. See also *R v Bliss* (1837) 7 Ad & El 550 at 554 (boundary of a road).

19 *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183 at 200; *R v Milton Inhabitants* (1843) 1 Car & Kir 58. See also *Pipe v Fulcher* (1858) 1 E & E 111; *Pollard v Scott* (1790) Peake 18 (cases where private maps were held inadmissible) and *Vyner v Wirral RDC* (1909) 73 JP 242. As to the admissibility in evidence of maps generally see para 939 post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(ii) Hearsay Evidence/938. Declarations by persons who have since died.

938. Declarations by persons who have since died.

Declarations made by persons who have since died are admissible evidence in two specific situations[1]: (1) where the declaration was made in the course of a duty or professional business if consisting of matters or facts within the deceased's personal knowledge and made at the time of the fact recorded[2]; and (2) where the declaration concerns public or general rights and interests, provided that it was made before any dispute or controversy arose[3].

1 As to the admissibility of hearsay evidence generally see the Civil Evidence Act 1995 s 1; para 932 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 808.

2 *Price v Earl of Torrington* (1703) 1 Salk 285; *Mellor v Walmesley* [1905] 2 Ch 164, CA (professional land surveyor's field book notes taken during a drainage survey were admissible); *Mercer v Denne* [1905] 2 Ch 538, CA (records of an old survey inadmissible as there was nothing to show that they were made

contemporaneously with the doing of something which it was the duty of the official to record); *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349 (draft report by a valuer made under the Tithe Act 1836 inadmissible because he had no direct knowledge of the matters recorded).

3 *Brisco v Lomax* (1838) 8 Ad & El 198 at 213 (boundaries of hamlet and private estate); *Evans v Rees* (1839) 10 Ad & El 151 (boundaries between parishes and counties). The rights must affect a class or group of people: *R v Bedfordshire Inhabitants* (1855) 4 E & B 535 at 541. See also *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA (evidence admissible as to whether a piece of land was a common); *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349 (draft under the Tithe Act 1836 related to individual and not general rights).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(iii) Other Documentary Evidence/939. Maps and plans.

(iii) Other Documentary Evidence

939. Maps and plans.

The general rule at common law as regards maps and surveys was that they were not receivable in evidence in the strict sense of the word either for or against the parties making them[1]. However, under the Civil Evidence Act 1995 many maps and plans may be admissible in evidence, particularly if they qualify as records held by public authorities[2]. They may also be admissible under the preserved common law rules[3], as published works dealing with matters of a public nature[4], as public documents[5], or as evidence of reputation[6]. As between two adjoining proprietors a private map is admissible in a dispute as to boundaries if, at the time the map was made, the two adjoining properties belonged to the person from whom both parties derive their respective titles[7].

A map annexed to a deed is part of the deed, and as a rule must be used as evidence of the parcels[8]. Where the connection is clear, the map need not be actually annexed to the deed to which it refers[9]; nor in all circumstances need it be referred to in the deed itself[10].

An inaccurate map does not affect or vitiate clear descriptions of parcels[11] but under certain circumstances a map or survey may override a verbal description of parcels[12].

On the extinguishment of manorial incidents under the Law of Property Act 1922[13], any plan made or approved by the Minister of Agriculture and Fisheries[14] and any definition of boundaries by him was conclusive as between the lord of the manor and the tenant[15], but it would not, it seems, be conclusive as to the boundaries before the date of determination[16].

Although a map attached to an award under an Inclosure Act[17] is evidence as to whether a road is a highway or not, it is not evidence of the boundaries of the highway where the strip of land bordering the highway is not dealt with in the award[18].

1 *Anon* (1718) 1 Stra 95; *Wilkinson v Allott* (1777) 3 Bro Parl Cas 684 (boundaries of glebe lands); *Pollard v Scott* (1790) Peake 18 (map taken by parish overseers no evidence as to boundary of a highway, and plan made by the lord of manor not usable as against tenants of the manor); *Wakeman v West* (1836) 7 C & P 479; *Phillips v Hudson* (1867) 2 Ch App 243 at 247 (where it was held that the tenant of a manor could not use against the lord a plan made by the lord). As to ordnance survey maps see paras 905, 934 ante.

2 See the Civil Evidence Act 1995 s 9; para 936 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 817.

3 As to the preservation of the common law rules see para 933 ante.

4 See the Civil Evidence Act 1995 s 7(2)(a); para 934 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 820.

5 See ibid s 7(2)(b); para 935 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 821.

6 See ibid s 7(3)(b)(ii); para 937 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 827.

7 *Doe d Hughes v Lakin* (1836) 7 C & P 481; *Neilson v Poole* (1969) 20 P & CR 909.

8 *Wakeman v West* (1836) 7 C & P 479 at 480; *Lyle v Richards* (1866) LR 1 HL 222; cf *Fraser v Anderson* 1951 SLT 51, Sh Ct. As to the use of plans for the description of parcels see *Re Sansom and Narbeth's Contract* [1910] 1 Ch 741; *Re Sparrow and James' Contract* (1902) [1910] 2 Ch 60; *Re Sharman and Meade's Contract* [1936] Ch 755, [1936] 2 All ER 1547. See also DEEDS AND OTHER INSTRUMENTS; SALE OF LAND.

9 *Yates v Harris* (1702) 1 Stra 95n (old map found with muniments of title which agreed with the boundaries adjusted on an old purchase). As to the admissibility of extrinsic evidence to link the two see para 929 ante.

10 *Leachman v L and K Richardson Ltd* [1969] 3 All ER 20, [1969] 1 WLR 1129. Cf, as to registered land, the Land Registration Rules 1925, SR & O 1925/1093, rr 79, 113 (both as amended): see para 929 ante; and LAND REGISTRATION.

11 *Mellor v Walmesley* [1905] 2 Ch 164, CA; *Willis v Watney* (1881) 51 LJCh 181.

12 *Barnard v De Charleroy* (1899) 81 LT 497, PC; *Eastwood v Ashton* [1915] AC 900, HL; *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225. As to conflicting descriptions see para 928 ante.

13 See CUSTOM AND USAGE vol 12(1) (Reissue) paras 641 et seq, 695 et seq; REAL PROPERTY vol 39(2) (Reissue) paras 31-35.

14 As to subsequent changes in the minister's style and title, and transfers of functions, see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 435.

15 See the Manorial Incidents (Extinguishment) Rules 1925, SR & O 1925/810, r 34(5) (spent).

16 *R v St Mary, Bury St Edmunds, Inhabitants* (1821) 4 B & Ald 462; cf *R v Milton Inhabitants* (1843) 1 Car & Kir 58.

17 As to inclosure and the Inclosure Acts see COMMONS vol 13 (2009) PARA 418 et seq.

18 *R v Berger* [1894] 1 QB 823, DC. A map accompanying an award of conservators of a common, relating to the 'improvement' of the common, and not also to the 'adjustment of rights' was not conclusive as to boundaries: *Collis v Amphlett* [1918] 1 Ch 232, CA; revsd on the facts [1920] AC 271, HL. As to highways see para 920 ante; and HIGHWAYS, STREETS AND BRIDGES.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(iii) Other Documentary Evidence/940. Ecclesiastical terriers.

940. Ecclesiastical terriers.

Ecclesiastical terriers, which are schedules of the temporal possessions of parochial churches and chapels kept by the minister and churchwardens of the church or chapel concerned[1], are receivable in evidence[2] provided they have come from the proper custody[3].

A terrier of glebe lands is evidence against, but not for, the parson, unless signed by the parson and by churchwardens not nominated by the parson. Its value as evidence is increased if it was signed also by some substantial parishioners[4].

1 As to church property generally see ECCLESIASTICAL LAW.

2 See the Civil Evidence Act 1995 s 7(2)(b), (c); paras 935-936 ante; and CIVIL PROCEDURE vol 11 (2009) PARAS 821-822. See also *Coombs v Coether and Wheeler* (1829) Mood & M 398; *A-G v Stephens* (1855) 6 De GM & G 111.

3 See *Atkins v Hatton* (1794) 2 Anst 386; *Coombs v Coether and Wheeler* (1829) Mood & M 398; *Croughton v Blake* (1843) 12 M & W 205 at 208 (where it was said that the custody need not be the most proper custody); *Earl v Lewis* (1801) 4 Esp 1. As to proper custody see generally CIVIL PROCEDURE.

4 Buller's Nisi Prius 248. Cf *Carr v Mostyn* (1850) 5 Exch 69, where returns made by parsons in answer to inquisitions made by the bishop regarding the boundaries, etc, of a parochial chapelry were admitted as evidence.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/2. EVIDENCE OF BOUNDARIES/(2) PARTICULAR KINDS OF EVIDENCE/(iii) Other Documentary Evidence/941. Verdict or award.

941. Verdict or award.

A verdict of a jury in a former action relating to a boundary is admissible as evidence of reputation in a subsequent action between different parties[1], provided the boundary in dispute was of public or general interest and not of mere private interest[2]. Ancient orders of sessions containing statements respecting boundaries[3] and presentments of manorial courts setting out boundaries[4] are also admissible as evidence of reputation[5], or, in certain cases, as public documents[6], or as records compiled by a person[7], or as acts or assertions of ownership[8]; but decrees purporting to be made by courts not known to the law are not so admissible[9].

An award of an arbitrator is not admissible as evidence of reputation[10], but in a subsequent suit between the same parties or those claiming through them such an award is admissible, not as hearsay, but as evidence properly so called[11].

1 As to the admissibility of judgments and orders in subsequent actions between the same parties see *Green v New River Co* (1792) 4 Term Rep 589; *Legatt v Tollervey* (1811) 14 East 302. See also CIVIL PROCEDURE.

2 *Evans v Rees* (1839) 10 Ad & El 151; *Reed v Jackson* (1801) 1 East 355 at 357; *Talbot v Lewis* (1834) 6 C & P 603; *Brisco v Lomax* (1838) 8 Ad & El 198 at 210 (where Littledale J said that a verdict was not reputation, but was as good evidence as reputation); *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL. See also the Civil Evidence Act 1995 s 7(3); para 937 ante; and CIVIL PROCEDURE. As to the value of verdicts see *Lee v Johnstone* (1869) LR 1 Sc & Div 426.

3 *Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273.

4 *Evans v Rees* (1839) 10 Ad & El 151. As to manorial books generally see para 935 ante. As to manorial courts see CUSTOM AND USAGE vol 12(1) (Reissue) para 699 et seq.

5 See para 937 ante.

6 See para 935 ante.

7 See para 936 ante.

8 See para 931 ante.

9 *Rogers v Wood* (1831) 2 B & Ad 245 (informal legal tribunal comprising Lord Treasurer, Lord Chancellor and the law officers).

10 *Evans v Rees* (1839) 10 Ad & El 151.

11 *Breton v Knight* (1837) cited in 1 Roscoe's Evidence in Civil Actions (20th Edn) p 223.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(1) TREES ON BOUNDARIES/942. Ownership of boundary trees.

3. TREES AND FENCES

(1) TREES ON BOUNDARIES

942. Ownership of boundary trees.

The ownership of a tree on a boundary is a question of fact in each case but such a tree will prima facie belong to the owner of the land on which it was planted[1]. Where ownership is disputed, the topping and lopping of a tree is evidence of acts of ownership[2]. It has been held that a tree planted right on a boundary which then extends its trunk and roots over the boundary was owned in common by the two landowners[3]; but the better view is that such a tree remains in the ownership of the land on which it was planted even when the trunk, roots and branches extend into the adjoining property[4].

1 *Masters v Pollie* (1620) 2 Roll Rep 141 (plaintiff had cut down a tree and had sawn it into boards, and in an action of trespass for breaking into the plaintiff's close and taking away his boards the defendant contended that, as the roots extended into his soil and had been nourished by it, he was entitled to a share of the tree; but it was held that, as the body of the tree was in the plaintiff's land, the whole of the tree belonged to the plaintiff though it was admitted that, had the plaintiff planted the tree in the soil of the defendant, it would have been otherwise).

2 *Davey v Harrow Corpn* [1958] 1 QB 60 at 70, [1957] 2 All ER 305 at 308, CA, per Lord Goddard CJ.

3 *Waterman v Soper* (1698) 1 Ld Raym 737. A legal tenancy in common is not now possible; joint ownership would seem to be inappropriate and a trust unnecessarily complicated. It seems that the Law of Property Act 1925 s 38, which makes provision in relation to party walls or other structures (see para 962 post), does not apply to trees.

4 See eg *Elliott v Islington London Borough Council* [1991] 1 EGLR 167, CA.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(1) TREES ON BOUNDARIES/943. Right to lop overhanging trees.

943. Right to lop overhanging trees.

Where the branches of a tree belonging to one landowner or occupier overhang the land of an adjoining owner or occupier, the latter may at any time cut off those parts which overhang[1] without notice to the former[2], provided that in so doing he does not trespass on the adjoining land. However, an adjoining owner is not entitled to lop his neighbour's tree as a precautionary measure before it overgrows his land merely because he knows that in the course of time the boughs will probably overhang his land[3]. The right to lop is a right to abate a nuisance constituted by overhanging branches and does not carry with it a right to appropriate severed branches or fruit growing on overhanging branches[4]. Where the overhanging tree is subject to a tree preservation order[5], the order does not apply to the lopping of a tree to abate a nuisance[6].

Encroaching roots are treated as falling within the same principle as overhanging branches, so that there is a right to cut encroaching roots[7]. Where the roots of a tree situate in the highway cause damage to the property of an adjoining owner then, providing the damage is reasonably foreseeable, the highway authority may be liable in nuisance[8].

1 *Earl of Lonsdale v Nelson* (1823) 2 B & C 302 at 311 per Best J.

2 *Lemmon v Webb* [1895] AC 1, HL. See also *Pickering v Rudd* (1815) 4 Camp 219. In *Joseph Dayani v Bromley London Borough Council* [2001] BLR 503, a tenant who lopped a tree to abate a nuisance on his own neighbouring land was held not liable in negligence to his landlord either as tenant of the property or as owner of the neighbouring property.

3 *Norris v Baker* (1616) 1 Roll Rep 393. He may, however, be entitled to an injunction if substantial damage is a virtual certainty and also imminent: *Lemos v Kennedy Leigh Development Co Ltd* (1961) 105 Sol Jo 178, CA (where an injunction in respect of encroaching roots was refused); *McCombe v Read* [1955] 2 QB 429, [1955] 2 All ER 458. As to remedies when damage has already occurred see para 944 post. As to rights to lop trees threatening to overhang highways see para 946 post. As to injunctions see CIVIL PROCEDURE.

4 *Mills v Brooker* [1919] 1 KB 555 at 557. As to the right to claim damages if the remedy of abatement is not exercised and damage subsequently occurs see para 944 post. It is not clear whether a claim for damages will lie (eg to recover the cost of employing a contractor to lop the branches) if the remedy of abatement is exercised. The judgments in *Kendrick v Bartram* (1677) 2 Mod Rep 253 and *Smith v Giddy* [1904] 2 KB 448 suggest that an action could be maintained for damages incurred prior to abatement. See also the dissenting judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations* [1924] 1 KB 341 at 356, CA. Contra 3 Bl Com (21st Edn) pp 219-220; *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 244, HL, per Lord Atkinson, who was of the opinion that the exercise of a right of abatement 'destroys any right of action in respect of the nuisance'. As to abatement of a nuisance see NUISANCE vol 78 (2010) PARA 214 et seq.

5 As to tree preservation orders see the Town and Country Planning Act 1990 s 198 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) para 847 et seq.

6 See ibid s 198(6); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) para 850. If an overhanging branch is considered a nuisance per se (*Lemmon v Webb* [1895] AC 1, HL) then it would appear that an overhanging branch on a tree subject to a preservation order can be lopped under the common law. It has been argued that to gain the statutory exemption now contained in the Town and Country Planning Act 1990 s 198(6) there must be proof of actual damage: see Bailey *A Tree is a Tree* (1978) 75 LS Gaz 1000.

7 See eg *Lemmon v Webb* [1894] 3 Ch 1 at 34, CA, per Kay LJ; *Smith v Giddy* [1904] 2 KB 448; *Butler v Standard Telephones and Cables Ltd* [1940] 1 KB 399, [1940] 1 All ER 121 (applying *Middleton v Humphries* (1913) 47 ILT 160); *McCombe v Read* [1955] 2 QB 429, [1955] 2 All ER 458; *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA; *Solloway v Hampshire County Council* (1981) 79 LGR 449, CA; *Bridges v Harrow London Borough Council* (1981) 260 EG 284; *Russell v Barnet London Borough Council* [1984] 2 EGLR 44; *Hurst v Hampshire County Council* [1997] 2 EGLR 164, CA. The adjoining owner acquires no property in the encroaching roots or in the trees: *Masters v Pollie* (1620) 2 Roll Rep 141 (see para 942 note 1 ante). See also *Hetherington v Galt* (1905) 7 F 706, Ct of Sess.

8 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737 (tree roots causing damage to a neighbouring building; held to be a continuing nuisance of which the defendant knew or ought to have known and the affected owner could recover the cost of reasonably necessary remedial work provided that a reasonable opportunity for abatement had been given); *Hurst v Hampshire County Council* [1997] 2 EGLR 164, CA (the adoption of a highway vests in the highway authority sufficient property in the trees to ground an action for nuisance, whether the tree was planted and growing before the dedication of the highway, or planted and growing after the dedication, or planted under statutory powers). See also para 946 post. As to highways and highway authorities see generally HIGHWAYS, STREETS AND BRIDGES.

944. Liability for damage caused by trees.

Although an adjoining owner has the right to trim hedges and lop the branches of trees belonging to another which overhang his land, the burden of so doing, or of watching to see when such action is required, ought not to be put on him by the acts of the owner of the land on which the trees are growing. Thus an action in nuisance for an injunction and damages will lie against an owner or occupier who allows the branches of his trees to overhang his boundary and cause injury to his neighbour's property[1], or who allows the roots of his trees to burrow under the boundary and cause damage[2], provided that the owner of the tree has, or ought to have had, knowledge of the existence of the problem and the danger thereby created[3]. Where

the tree is a nuisance to the adjoining owner, then an injunction may in appropriate circumstances be obtained against the owner for the removal of the tree[4]. If the overhanging trees or encroaching roots are not in fact causing damage, it seems that the only right of the person whose land is affected is to cut back the overhanging or encroaching portions[5].

On the same principle, a person who permits the branches of poisonous trees growing near his boundary to extend over the land of an adjoining owner will be liable in nuisance, if the branches are eaten by the adjoining owner's cattle, for any consequent injury to the cattle[6]; but since a lessee takes the property as he finds it, a tenant who takes land with the branches of yew trees overhanging it from the landlord's adjoining land so as to be within reach of cattle cannot recover from the landlord damages for injury to cattle through eating the branches[7]. Nor will any action lie if the branches do not extend over the boundary but the adjoining owner's cattle trespass by reaching over the boundary and so eat the foliage of poisonous trees growing there[8].

No right to have trees overhanging the land of another, or with their roots encroaching, can be acquired by prescription or under the Limitation Act 1980, since the trees grow from year to year[9].

1 *Smith v Giddy* [1904] 2 KB 448. As to actions in nuisance see NUISANCE vol 78 (2010) para 173 et seq. As to injunctions see CIVIL PROCEDURE. As to damages see DAMAGES.

2 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737. See also *McCombe v Read* [1955] 2 QB 429, [1955] 2 All ER 458; *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA; *Morgan v Khyatt* [1964] 1 WLR 475, PC; *Masters v Brent London Borough Council* [1978] QB 841, [1978] 2 All ER 664.

3 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 522, [1980] 1 All ER 17 at 33, CA, per Megaw LJ; *Solloway v Hampshire County Council* (1981) 79 LGR 449, CA (risk of subsidence by encroaching roots not reasonably foreseeable when caused by a pocket of clay soil); *Russell v Barnet London Borough Council* [1984] 2 EGLR 44 (risk was foreseeable and action should have been taken when tree was situated next to a house built on London clay). See also *Bridges v Harrow London Borough Council* (1981) 260 EG 284; *Hurst v Hampshire County Council* [1997] 2 EGLR 164, CA.

4 *Elliott v Islington London Borough Council* [1991] 1 EGLR 167, CA (mature horse chestnut belonging to the local authority had grown to invade the plaintiff's property and deflect his wall; injunction to remove, in absence of a tree preservation order, upheld notwithstanding the tree's amenity value). Cf *Atkinson v Castan* (1991) Times, 17 April, CA.

5 *Smith v Giddy* [1904] 2 KB 448 at 451 per Kennedy J. The fact that the claimant possesses this remedy is no answer to an action for damages if any damage has in fact been sustained: *Smith v Giddy* supra at 451 per Wills J; and see *Mills v Brooker* [1919] 1 KB 555. The same principle was applied to a fence leaning a few inches at the top in *Mann v Saulnier* (1959) 19 DLR (2d) 130 (NB App Div). Allowing a tree to grow over the land of another is not in itself an actionable trespass: *Lemmon v Webb* [1894] 3 Ch 1 at 11-12, CA, per Lindley LJ (affd [1895] AC 1, HL); *Davey v Harrow Corpn* [1958] 1 QB 60 at 70, [1957] 2 All ER 305 at 308, CA, per Lord Goddard CJ; cf *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343 (projecting advertising sign was trespass, not nuisance).

6 *Crowhurst v Amersham Burial Board* (1878) 4 ExD 5 at 10, as explained in *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA. As to liability for similar injuries based on liability for dangerous fences or breach of an obligation to fence see paras 955, 957 post.

7 *Cheater v Cater* [1918] 1 KB 247, CA; *Erskine v Adeane, Bennett's Claim* (1873) 8 Ch App 756. Whether the tenant would have a claim if the branches, at the beginning of the tenancy, either were not overhanging at all or were overhanging but out of reach was left undecided in *Cheater v Cater* supra. Both of these cases are based on a distinction between disputes between adjoining owners and disputes between landlord and tenant (see *Cheater v Cater* supra at 254). See also *Shirvell v Hackwood Estates Co Ltd* [1938] 2 KB 577, [1938] 2 All ER 1, CA, a case argued and decided in negligence and not nuisance, which applied *Cheater v Cater* supra in relation to an unsuccessful action for personal injury caused to a servant of a tenant by the fall of an overhanging branch of a dead tree. In the light of the decisions in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA (overruling *Giles v Walker* (1890) 24 QBD 656 (see note 8 infra)) and *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA, a claim in nuisance might now succeed on the facts of these cases.

8 *Ponting v Noakes* [1894] 2 QB 281. Cf *Wilson v Newberry* (1871) LR 7 QB 31 (no action where clippings from poisonous trees were taken on to neighbour's land by a third party). An action will lie if poisonous leaves from trees growing on the land of one owner are blown onto the adjoining land and cause injury to cattle eating them: see *Davey v Harrow Corpn* [1958] 1 QB 60 at 71-72, [1957] 2 All ER 305 at 310, CA, per Lord Goddard CJ. *Giles v Walker* (1890) 24 QBD 656, which held that an owner of land was not liable for damage caused by thistledown blown onto his neighbour's land, was overruled in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA.

9 *Lemmon v Webb* [1895] AC 1, HL; *Davey v Harrow Corpn* [1958] 1 QB 60 at 70, [1957] 2 All ER 305 at 309, CA, per Lord Goddard CJ. As to the Limitation Act 1980 see LIMITATION PERIODS.

UPDATE

944 Liability for damage caused by trees

TEXT AND NOTES--Local authorities have powers to deal with complaints about high hedges which are having an adverse effect on a neighbour's enjoyment of his property: see the Anti-social Behaviour Act 2003 Pt 8 (ss 65-84); and NUISANCE vol 78 (2010) PARA 131 et seq.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(1) TREES ON BOUNDARIES/945. Entry on neighbour's land.

945. Entry on neighbour's land.

There is some authority for the proposition that if a man is unable to lop his trees without the boughs falling upon the land of his neighbour, he may justify the felling upon his neighbour's land[1], and that if a tree grows so that the fruit falls upon the land of another, the owner of the tree may enter upon the other's land for the purpose of taking possession of the fruit[2].

1 *Dike and Dunston's Case* (1586) Godb 52 at 53.

2 *Mitten v Faudrye* (1626) Poph 161 at 163. It has been observed that: 'If trees grow in my hedge, hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I may make no longer stay there than is convenient, nor break his hedge' (Vin Abr Trespass L a); and it is stated that the same rule applies when trees are blown over by the wind (Vin Abr Trespass H a 2). Cf *Anthony v Haney* (1832) 8 Bing 186. However, the existence of such a right seems to have been doubted in *Mills v Brooker* [1919] 1 KB 555 at 558 per Bray J.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(1) TREES ON BOUNDARIES/946. Trees adjoining or planted in highways.

946. Trees adjoining or planted in highways.

Local authorities and the Secretary of State[1] are invested with statutory powers to order the lopping or pruning of trees or hedges overhanging a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians[2]. Local authorities and the Secretary of State are also empowered to order the

felling of trees or hedges which are dead, diseased, damaged or insecurely rooted and therefore likely to cause danger by falling onto a highway or other road or footpath to which the public has access[3].

Subject to specified exemptions, no tree or shrub may be planted in a highway or within 15 feet from the centre of a made-up carriageway[4], but the highway authority may license the occupier or the owner of any premises adjoining the highway to plant or to retain trees in such part of the highway as may be specified in the licence[5]. A highway authority may plant trees in a highway maintainable at public expense by it[6] but no such tree may be planted or allowed to remain so as to be a nuisance or injurious to the owner or occupier of premises adjacent to the highway[7].

A tree in the highway or upon the highway verge may remain the property of the landowner adjoining the highway[8] so that such an owner may be liable to a user of the highway if the tree or a branch thereof constitutes a nuisance[9], but liability will only arise when the owner becomes aware of its being a nuisance[10].

Notwithstanding the strict ownership of a tree in a highway, the relevant highway authority has a right and duty to remove a tree which constitutes a nuisance[11].

Moreover, a highway authority may be liable to an adjoining owner for damage caused by encroaching roots, even if that owner is the strict owner of the tree[12], since a highway authority has a sufficient interest in, and control of, such trees under statutory powers[13]. A local authority which is not the highway authority but is the owner of the soil in which the tree stands may be liable for nuisance caused by encroaching tree roots[14]. In all cases, there must be a reasonably foreseeable risk that the encroaching roots would cause damage[15].

1 The Highways Act 1980 refers to the Minister of Transport, but his functions were transferred to the Secretary of State: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 49. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 509. Certain functions of the Secretary of State, so far as exercisable in relation to Wales, have been transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the office of Secretary of State see para 985 note 7 post.

2 See the Highways Act 1980 s 154(1) (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 379. This power extends to hedges and trees which obstruct or interfere with the view of drivers of vehicles or the light from a public light, or which overhang a highway so as to endanger or obstruct the passage of horse-riders: see s 154(1) (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 379. As to the power to require trees or hedges to be cut or lopped to remove damage caused by the exclusion of the sun or wind from the highway see s 136 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 347. As to the power to order the lopping of trees and hedges interfering with airfields see the Land Powers (Defence) Act 1958 s 10 (as amended).

3 See the Highways Act 1980 s 154(2); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 379. As to tree preservation orders see para 943 notes 5, 6 ante; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) para 847 et seq.

4 See ibid s 141 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 352.

5 See ibid s 142 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 555. As to highway authorities see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 49 et seq.

6 See ibid s 96(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 554. The power to maintain trees, and to prune trees, applies to all categories of trees planted in a highway, whether planted before or after the dedication of the highway or planted by the highway authority under its statutory powers: *Hurst v Hampshire County Council* [1997] 2 EGLR 164 at 166, CA, per Stuart-Smith LJ.

7 See the Highways Act 1980 s 96(6); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 554. This provision, unlike s 96(1) (see the text and note 6 supra), applies only to trees planted by the highway authority under its statutory powers: *Hurst v Hampshire County Council* [1997] 2 EGLR 164 at 166, CA, per Stuart-Smith LJ. If damage is caused to property by exercise of the powers under the Highways Act 1980 s 96, then compensation may be recovered from the authority by which the powers were exercised: see s 96(7); and

HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 554. It appears that s 96(7) applies to all categories of trees: *Hurst v Hampshire County Council* supra at 166 per Stuart-Smith LJ.

8 *Stillwell v New Windsor Corpn* [1932] 2 Ch 155; *British Road Services Ltd v Slater* [1964] 1 All ER 816, [1964] 1 WLR 498; *Russell v Barnet London Borough Council* [1984] 2 EGLR 44.

9 *British Road Services Ltd v Slater* [1964] 1 All ER 816, [1964] 1 WLR 498, applying *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1940] 3 All ER 349, HL. As to the liability of the occupier of land adjoining a highway for injury caused by a tree falling on the highway see *Caminer v Northern and London Investment Trust Ltd* [1951] AC 88, [1950] 2 All ER 486, HL (owner of a tree which caused injury as it fell not liable in either nuisance or negligence where the tree was apparently sound and an inspection would not have revealed any damage); *Cunliffe v Bankes* [1945] 1 All ER 459; *Brown v Harrison* (1947) 177 LT 281; *Quinn v Scott* [1965] 2 All ER 588, [1965] 1 WLR 1004. See also HIGHWAYS, STREETS AND BRIDGES; NUISANCE vol 78 (2010) para 155 et seq.

10 *British Road Services Ltd v Slater* [1964] 1 All ER 816 at 820, [1964] 1 WLR 498 at 504 per Lord Parker CJ. The fact that the highway authority has powers and duties in relation to the tree does not necessarily exonerate the adjoining owner: *British Road Services Ltd v Slater* supra at 819 and 502 per Lord Parker CJ.

11 See *Stillwell v New Windsor Corpn* [1932] 2 Ch 155; *British Road Services Ltd v Slater* [1964] 1 All ER 816, [1964] 1 WLR 498; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 227. See also the Highways Act 1980 s 96; the text and notes 6-7 supra; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 554.

12 The presumption that the soil of the highway to the median line (*usque ad medium filum viae*) belongs to the owners of the adjoining land may apply: *Goodtitle d Chester v Alker and Elmes* (1757) 1 Burr 133 at 143 per Lord Mansfield. See further HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 217. The presumption is not rebutted by the Land Registry practice of excluding adjoining highways from title plans: *Russell v Barnet London Borough Council* [1984] 2 EGLR 44. As to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) para 1064.

13 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737; *Hurst v Hampshire County Council* [1997] 2 EGLR 164, CA; *Solloway v Hampshire County Council* (1981) 79 LGR 449, CA. See also *Russell v Barnet London Borough Council* [1984] 2 EGLR 44 (disapproved in part in *Hurst v Hampshire County Council* [1997] 2 EGLR 164 at 166, CA, per Stuart-Smith LJ). Although only a person with an interest in land may maintain an action for nuisance (*Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL), the fact that the damage that caused the nuisance occurred prior to the claimant's purchase is irrelevant (*Delaware Mansions Ltd v Westminster City Council* supra).

14 *Bridges v Harrow London Borough Council* (1981) 260 EG 284.

15 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737 (liability for continuing nuisance caused by tree roots since the defendant council knew, or ought to have known, of the problem); *Solloway v Hampshire County Council* (1981) 79 LGR 449, CA (where there was a small pocket of clay soil which was insufficient to appear on the geological map, the risk was not foreseeable), applying *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA, but subject to the proviso in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 522, [1980] 1 All ER 17 at 33, CA, per Megaw LJ; *Russell v Barnet London Borough Council* [1984] 2 EGLR 44. See also NUISANCE vol 78 (2010) PARAS 182, 229 et seq.

UPDATE

946 Trees adjoining or planted in highways

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES

(i) Introduction

947. Definitions of fences.

Although fences are frequently used to mark the situation of boundaries, none the less they are primarily guards against intrusion, or barriers to prevent persons or animals straying out, and therefore in this sense the term includes not only hedges, banks, and walls, but also ditches[1]. But an external or party wall forming part of a building and alongside or on the boundary of land is not usually regarded as a fence[2].

For the purposes of the Animals Act 1971, 'fencing' includes the construction of any obstacle designed to prevent animals from straying[3].

A fence has been held not to be a 'building or erection' within the meaning of a local Act prohibiting the making of a building or erection within ten feet of the head of a wharf[4].

The term 'freeboard' or 'freebord' land is commonly applied to a strip of land, varying in width according to local custom, outside and adjoining the fence of a manor, park, forest, or other estate, which belongs to or of which a right of user is claimed by the owner of the land within the fence[5].

1 Woolrych *The Law of Party Walls and Fences* p 281 ('A fence may consist of almost any kind of enclosure or division but a hedge, ditch, bank or wall will be most commonly found to answer that term').

2 As to buildings on boundaries see para 908 ante. As to party walls see para 961 et seq post.

3 See the Animals Act 1971 s 11; and ANIMALS vol 2 (2008) PARA 754.

4 *A-G and Great Yarmouth Port and Haven Comrs v Harrison* (1920) 89 LJCh 607, CA.

5 See 46 Sol Jo (1901) 118; Mon Angl Pt II, fol 241; Selden Society, Pleas of the Forest. See also para 918 note 8 ante. Richmond Park, for instance, has a freeboard of sixteen and a half feet outside the boundary wall.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/(ii) Extent of Duty to Fence/948. Extent of duty to fence.

(ii) Extent of Duty to Fence

948. Extent of duty to fence.

At common law, in the absence of a specific duty arising from agreement[1], prescription or implied grant[2], or custom[3], there is no general obligation upon a landowner to fence his land either against or for the benefit of his neighbour[4] or the public[5]. There is, however, a common law duty to erect or repair a fence where persons using the highway might otherwise be endangered[6], and in certain circumstances where the absence of a fence would constitute a nuisance[7], and there may also be liability at common law or by virtue of statute[8] for damage arising in circumstances where the existence of a proper fence would have prevented the damage[9].

The general rule applies as between adjoining tenants of the same landlord, notwithstanding that their leases contain covenants with the landlord to keep their fences in repair[10].

A landlord who leases a part of his land and retains the rest in his hands is under no obligation, apart from express agreement[11] or implied grant[12], to keep the fences bounding the retained land in repair so as to prevent the lessee's cattle from straying onto his land[13].

Where a duty to fence does arise[14], the duty can normally only exist as between adjacent properties[15]. Such a duty will not generally carry with it the right to enter on the neighbouring land to do repairs unless an express right of entry exists[16] or such a right could be implied[17]. However, there are statutory rights to enter in relation to party walls[18].

1 *Hilton v Ankesson* (1872) 27 LT 519; *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA. Cf *Green v Eales* (1841) 2 QB 225. See also *Boyle v Tamlyn* (1827) 6 B & C 329. As to duties arising by agreement see para 951 post.

2 *Lawrence v Jenkins* (1873) LR 8 QB 274; *Barber v Whiteley* (1865) 34 LJQB 212; *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA. As to duties arising by prescription or implied grant see para 952 post.

3 *Egerton v Harding* [1975] QB 62 at 71, [1974] 3 All ER 689 at 694, CA, per Scarman LJ. As to duties arising by custom see para 953 post.

4 *Star v Rookesby* (1710) 1 Salk 335; *Churchill v Evans* (1809) 1 Taunt 529; *Hilton v Ankesson* (1872) 27 LT 519; *Co-operative Wholesale Society Ltd v British Railways Board* (1995) Times, 20 December, CA.

5 *Cornwell v Metropolitan Sewers Comrs* (1855) 10 Exch 771 at 773 per Pollock CB; *Blyth v Topham* (1608) Cro Jac 158; *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL. As to restrictions on the right to erect fences see the Law of Property Act 1925 s 194 (as amended); and COMMONS vol 13 (2009) PARA 567. As to fencing restrictions in relation to common land see para 912 ante; and as to planning restrictions see para 960 post.

6 See, however, *Hoskin v Rogers* (1985) Times, 25 January, CA (accident on a highway resulting from cattle straying due to inadequate fencing; though the owner of the cattle was liable, the owner of the land was not liable in negligence where the land was let on a 'without attention' grass purchase agreement at a time when the fencing was adequate and there was no evidence that the owner was aware that it had become inadequate).

7 See para 949 post.

8 Eg the Animals Act 1971 ss 4, 5 (see para 958 post), and the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984 (see NEGLIGENCE vol 78 (2010) PARA 29 et seq).

9 See para 958 post.

10 *Holgate v Bleazard* [1917] 1 KB 443; but quaere if this rule may not have been abrogated, at least in part, by the Animals Act 1971 s 5(6) (see para 958 post). Cf the Defective Premises Act 1972 s 4, which provides that a landlord who has maintenance or repairing obligations owes, to all persons who might be reasonably expected to be affected by the state of the premises, a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or damage to property caused by a relevant defect: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 475.

11 As to the prescribed terms deemed to be incorporated into a contract of tenancy of an agricultural holding see the Agricultural Holdings Act 1986 s 7(1); the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, SI 1973/1473 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARAS 332-333. As to the repair of walls and fences see reg 3, Schedule paras 1(1), 5; and AGRICULTURAL LAND vol 1 (2008) PARA 333.

12 See *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA; and para 952 post.

13 *Erskine v Adeane, Bennett's Claim* (1873) 8 Ch App 756.

14 See paras 949-953 post.

15 *Anon* (1496) Keil 30; *King v Rose* (1673) Freem KB 347; *Dovaston v Payne* (1795) 2 Hy Bl 527; *Sutcliffe v Holmes* [1947] KB 147 at 154, [1946] 2 All ER 599 at 602, CA, per Somervell LJ.

16 There is no general common law right of entry onto the land of another to repair or maintain structures abutting the boundary (see eg *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P & CR 104) though such a right can exist as an easement and arise by implied grant or prescription (see *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609; and EASEMENTS AND PROFITS A PRENDRE). Since the enactment of the Party Wall etc Act 1996, statutory rights of access are now available: see the text and note 18 infra; and para 984 post. See also the Access to Neighbouring Land 1992; and NUISANCE vol 78 (2010) PARAS 116, 185. See also EASEMENTS AND PROFITS A PRENDRE.

17 An implied right may exist where the duty to fence is owed to the neighbour and the only method of fulfilling that duty is to enter onto that neighbour's land: see Aldridge *Boundaries, Walls and Fences* (7th Edn, 1986) p 65.

18 See note 16 supra; and para 984 post.

UPDATE

948-950 Extent of duty to fence ... Statutory obligations to fence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

948 Extent of duty to fence

NOTE 5--Law of Property Act 1925 s 194 repealed: Commons Act 2006 Sch 6 Pt 2 (in force in relation to England: SI 2007/2584).

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949. Common law duties to fence.

At common law an owner of land across or by the side of which a highway runs is, as a general rule, under no duty to fence off his land from the highway to prevent injury to those straying from the road, for persons so straying from a highway do so, generally, at their peril[1]. However, where there is an artificial structure or object[2] or an excavation[3] on land which if it were left unfenced would amount to a public nuisance[4] by reason of its adjoining a highway[5] or being sufficiently near to it to be dangerous to persons lawfully using the highway[6], a common law duty is cast on the person occupying the land[7] to fence the work[8]. This is so whether the work existed before or was made after the occupier first took possession and whether or not, if he is a tenant, he is liable to his landlord[9]. If the occupier neglects this duty, it may be enforced by a mandatory order to abate the nuisance[10], and the occupier is liable for any injury caused to persons lawfully passing along the highway, or to their property, even though the obligation of fencing the highway as such is by statute expressly imposed on someone else[11], except where the work has existed from time immemorial[12] or, at all events, was made before the dedication of the highway[13].

A similar duty may, perhaps, exist where the work, though not near a highway, is near a private way which the public is invited to use[14].

There is no duty on the occupier of land to fence a danger arising from some natural feature, such as a river, as distinguished from a danger artificially created[15]; nor is the owner of land adjoining a highway bound to do anything to remove a danger which has been created by

something done on the highway by the highway authority[16]. There is no common law duty on a highway authority to fence against such dangers unless it has long been accustomed to do so[17].

It has also been held that persons opening pits or quarries in land of which they do not own the surface have a common law duty to fence so as to prevent injury to cattle belonging to the owner of the surface[18].

1 *Hardcastle v South Yorkshire Rly and River Dun Co* (1859) 4 H & N 67; *Binks v South Yorkshire Rly and River Dun Co* (1862) 3 B & S 244; *Jordin v Crump* (1841) 8 M & W 782 at 788 per Alderson B; *Potter v Perry* (1859) 23 JP 644; *Hawken v Shearer* (1887) 56 LJQB 284 at 286; *Hounsell v Smyth* (1860) 7 CBNS 731; *Prentice v Assets Co Ltd* (1890) 17 R 484, Ct of Sess. Cf *Devlin v Jeffray's Trustees* (1902) 5 F 130, Ct of Sess; *Jenkins v Great Western Rly Co* [1912] 1 KB 525, CA. As to the fencing of highways by adjoining owners see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 332. As to the power of highway authorities to erect and maintain fences see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 552. As to statutory duties to fence see para 950 post. As to the liability of a landowner whose animals stray on to the highway see para 958 post; and ANIMALS vol 2 (2008) PARA 754.

2 Eg a brazier bearing a ladle of molten lead (*Crane v South Suburban Gas Co* [1916] 1 KB 33, DC), or a low archway (*Bedman v Tottenham Local Board of Health* (1887) 4 TLR 22), or a live electric wire (*British Railways Board v Herrington* [1972] AC 877 at 914, [1972] 1 All ER 749 at 771, HL, per Lord Wilberforce).

3 Eg a basement access area (*Coupland v Hardingham* (1813) 3 Camp 398; *Barnes v Ward* (1850) 9 CB 392; *Barker v Herbert* [1911] 2 KB 633, CA), a canal (*Manley v St Helens Canal and Rly Co* (1858) 2 H & N 840), a pond (*Ross v Keith* (1888) 16 R 86, Ct of Sess), or a gap in area railings caused by a car accident (*Stevenson v Edinburgh Magistrates* 1934 SC 226).

4 *Barnes v Ward* (1850) 9 CB 392; *Cornwell v Metropolitan Sewers Comrs* (1855) 10 Exch 771 at 774 per Martin B. As to nuisances generally see NUISANCE vol 78 (2010) para 101 et seq.

5 *Barnes v Ward* (1850) 9 CB 392; *Hounsell v Smyth* (1860) 7 CBNS 731.

6 *Hardcastle v South Yorkshire Rly and River Dun Co* (1859) 4 H & N 67 at 75 per Pollock CB; *Hadley v Taylor* (1865) LR 1 CP 53; *Prentice v Assets Co Ltd* (1890) 17 R 484, Ct of Sess. If an excavation is not near enough to the highway to be dangerous at ordinary times, there is no duty to fence it merely because the weather is foggy: *Caseley v Bristol Corpn* [1944] 1 All ER 14, CA.

7 *Hadley v Taylor* (1865) LR 1 CP 53; cf *Cheetham v Hampson* (1791) 4 Term Rep 318; *Bishop v Bedford Charity Trustees* (1859) 1 E & E 714. But the owner, though not in occupation, is liable also where, as between himself and the occupier, he has undertaken the duty of fencing: *Payne v Rogers* (1794) 2 Hy Bl 350; *Wilchick v Marks and Silverstone* [1934] 2 KB 56. Cf *Bush v Steinman* (1799) 1 Bos & P 404. See also the Defective Premises Act 1972 s 4 (see para 948 note 10 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 475) and the Occupiers' Liability Act 1984 s 1 (as amended) (see para 950 post; and NEGLIGENCE vol 78 (2010) PARA 40).

8 *A-G v Roe* [1915] 1 Ch 235. As to the consequences of neglect of the duty see para 957 post. As to duties of care in relation to property see NEGLIGENCE.

9 *A-G v Roe* [1915] 1 Ch 235.

10 *A-G v Roe* [1915] 1 Ch 235. As to abatement of a nuisance see NUISANCE vol 78 (2010) PARAS 217, 221; and as to actions for public nuisance see NUISANCE vol 78 (2010) PARA 187 et seq.

11 *Wettor v Dunk* (1864) 4 F & F 298.

12 *Cornwell v Metropolitan Sewers Comrs* (1855) 10 Exch 771 (ditch); *Wilson v Halifax Corpn* (1868) LR 3 Exch 114 at 118 per Kelly CB.

13 *Fisher v Prowse, Cooper v Walker* (1862) 2 B & S 770; *Robbins v Jones* (1863) 15 CBNS 221.

14 *Binks v South Yorkshire Rly and River Dun Co* (1862) 3 B & S 244 at 254 per Blackburn J; *Corby v Hill* (1858) 4 CBNS 556 at 561 per Byles J. But see *Melville v Renfrewshire County Council* 1920 SC 61. See also the Occupiers' Liability Act 1957; the Occupiers' Liability Act 1984; and NEGLIGENCE vol 78 (2010) PARA 29 et seq.

15 *Morrison v London Midland and Scottish Rly Co* 1929 SC 1.

16 *Horridge v Makinson* (1915) 84 LJKB 1294 (pavement raised by highway authority but opening left to preserve access to coal chute); *Nicholson v Southern Rly Co and Sutton and Cheam UDC* [1935] 1 KB 558 (change of level); *Myers v Harrow Corpn* [1962] 2 QB 442, [1962] 1 All ER 876, DC.

17 *R v Whitney* (1835) 7 C & P 208 at 211; *Whyler v Bingham RDC* [1901] 1 KB 45 at 48, 50. As to statutory powers and duties see para 950 post; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 552.

18 *Williams v Groucott* (1863) 4 B & S 149; *Hawken v Shearer* (1887) 56 LJQB 284; *Sybray v White* (1836) 1 M & W 435 at 440 per Parke B (distinguished in *Hickey v Tipperary County Council* [1931] IR 621, where the plaintiff was the owner and occupier of the quarry as well as of the land in which it stood and the defendants, who had merely a licence to take stone, were held not liable to fence). The liability to fence is a continuing liability on the successors in title of the person working the quarry: *M'Morrow v Layden* [1919] 2 IR 398. As to the statutory duty to fence pits and quarries see para 950 post. As to the duty of care owed by occupiers of land for the safety of lawful visitors and other persons see the Occupiers' Liability Act 1957; the Occupiers' Liability Act 1984; and NEGLIGENCE vol 78 (2010) PARA 29 et seq.

UPDATE

948-950 Extent of duty to fence ... Statutory obligations to fence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/(ii) Extent of Duty to Fence/950. Statutory obligations to fence.

950. Statutory obligations to fence.

There are numerous statutes which impose duties to fence on the owners or occupiers of particular classes of property.

The owner[1] of an abandoned mine, or a mine which has not been worked for a period of 12 months[2], must secure that the surface entrance to every shaft or outlet of that mine is provided with an efficient device to prevent any person from accidentally falling down the shaft or from accidentally entering the outlet, and must also secure that every such device is properly maintained[3]. Failure to comply with this obligation results in the mine being a statutory nuisance[4]. Similarly a quarry (whether being worked or not) which is not provided with an efficient and properly maintained barrier to prevent anyone falling into the quarry and which by reason of its accessibility[5] from a highway or a place of public resort[6] constitutes a danger to members of the public is a statutory nuisance[7]. Where there is a danger to the public from an excavation on land accessible to the public from a highway or place of public resort, by reason of the excavation being unenclosed or inadequately enclosed, then a local authority can require works, which may include fencing, to remove the danger in question[8]. In default, or in cases where the council does not know the owner or occupier of the land, the council may carry out the necessary work itself[9].

Under the Highways Act 1980[10], a duty is imposed upon the owner of land adjoining a street[11] to fence adequately anything on the land which is a source of danger to persons using the street, as, for example, a building in the course of demolition[12]. Where the only source of danger is the difference in levels between the street and the adjoining land caused by the highway authority raising the level of the street, there cannot be said to be a danger in or on the adjoining land so as to impose a duty on the landowner to fence[13]. A highway authority may erect fences or posts for the purpose of preventing access to a highway maintainable at public expense by it; but not so as to interfere with a gate required for agricultural access nor to obstruct a public right of

way or means of access for which planning permission has been granted or for which such permission was not required[14].

It is the duty of the Parsonages Board or the Diocesan Board of Finance to repair and maintain the fences of parsonages[15].

Statutory fencing obligations may continue to exist under the Inclosure Acts[16]. In general, allotments under these Acts had to be fenced at the expense of the allottees[17], but any such obligations are not enforceable against successors in title of the allottees[18].

A railway undertaking acquiring land compulsorily is under a duty to fence off the land used for the railway from the adjoining land, and to maintain the fences at all times thereafter for the protection of the land not taken for railway use[19], but when the undertaking first acquires the land the obligation to fence may be released by the vendor in return for the payment of compensation[20]. When the obligation is not so released when the land is acquired, the obligation to maintain fences is an indefinite one and devolves on any successors to the original undertaking and is not affected merely by the cessation of the use of the line and removal of the track[21].

Although the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984 do not impose any specific liability to fence, an occupier will often only be able to discharge the common duty of care owed to lawful visitors[22] or the duty of care owed to a person who is not a visitor[23] by fencing dangers on the land. Similarly, it may be necessary to fence in order to avoid liability under the provisions of the Animals Act 1971[24] or the Defective Premises Act 1972[25].

Obligations to fence may also be imposed in particular circumstances by local Acts[26]. Where there is a statutory obligation to fence and no other sufficient remedy is provided for breach of the obligation, a mandatory order may be granted for the purpose[27].

1 Ie as defined by the Mines and Quarries Act 1954 s 181 (as amended): see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 512.

2 There is an exception in the case of mines (other than of coal, stratified ironstone, shale or fireclay) which have not been worked since 9 August 1872 (see ibid s 151(1) proviso); but even here there may be a statutory nuisance (s 151(2)(b) (as amended)). See further MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 530. As to statutory nuisances see the Environmental Protection Act 1990 s 79 (as amended); and NUISANCE vol 78 (2010) PARA 156. See also NUISANCE vol 78 (2010) PARA 115.

3 See the Mines and Quarries Act 1954 s 151(1); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 530.

4 See ibid s 151(2)(a) (as amended); and MINES, MINERALS AND QUARRIES vol 31 (Reissue) para 532; NUISANCE vol 78 (2010) PARA 156.

5 Accessibility means capability of access without reasonable let or hindrance: cf *Henaghan v Rederiet Forangirene* [1936] 2 All ER 1426.

6 This includes places where the public resort in fact, even though not of right: cf *Kitson v Ashe* [1899] 1 QB 425, DC.

7 See the Mines and Quarries Act 1954 s 151(2)(c) (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 530; NUISANCE vol 78 (2010) PARA 156. As to the fencing of surface entrances to the shafts of working mines see the Mines (Shafts and Winding) Regulations 1993, SI 1993/302, reg 9. As to tips associated with mines and quarries and the duty to make such tips secure see the Mines and Quarries (Tips) Act 1969; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) para 540 et seq.

8 See the Local Government (Miscellaneous Provisions) Act 1976 s 25(1), (2) (s 25(1) as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 581.

9 See ibid s 25(1), (5) (s 25(1) as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 581.

10 Ie under the Highways Act 1980 s 165: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 371. As to animals straying on the highway see ANIMALS vol 2 (2008) PARA 754; HIGHWAYS, STREETS AND BRIDGES vol 21

(2004 Reissue) para 350. As to the power of a highway authority to provide pillars, wall, rails or fences in a highway or private street for the purpose of safeguarding users of the highway or street see ss 66(2), 67(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) paras 545-546.

11 'Street' includes any highway, road, lane, footway, square, court, alley or passage whether a thoroughfare or not: see ibid s 329(1) (as substituted); the New Roads and Street Works Act 1991 s 48(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 9.

12 It seems that this provision has no application where the existing fence ought to be repaired by the highway authority: see *Rotherham Corpn v Fullerton* (1884) 50 LT 364.

13 *Myers v Harrow Corpn* [1962] 2 QB 442, [1962] 1 All ER 876, DC.

14 See the Highways Act 1980 s 80(1), (3) (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 233. In an area of the countryside where walls of a particular construction are a feature, references in s 80 (as amended) include references to walls of that construction: see the Wildlife and Countryside Act 1981 s 72(12).

15 Provision is made for the execution of repairs by the Repair of Benefice Buildings Measure 1972, and fences are brought within its scope by ss 2(1), 4, 5, 9 (s 4 as amended): see ECCLESIASTICAL LAW. As to dwelling houses deemed to be parsonage houses for the purpose of this Measure see the Endowments and Glebe Measure 1976 s 33; and ECCLESIASTICAL LAW.

16 As to the Inclosure Acts see COMMONS vol 13 (2009) PARA 418 et seq.

17 See eg the Inclosure Act 1845 s 83 (as amended); and COMMONS vol 13 (2009) PARA 420.

18 See *Marlton v Turner* [1998] 3 EGLR 185 (county court).

19 See the Railways Clauses Consolidation Act 1845 s 68; *Cooper v Railway Executive (Southern Region)* [1953] 1 All ER 477, [1953] 1 WLR 223; and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) paras 326, 337-338. The extent of this duty to fence is limited to marking off the railway property and there is no general duty to erect or maintain fences sufficient to exclude adult or child trespassers: *Proffitt v British Railways Board* [1985] CLY 2302, CA.

20 See the Railways Clauses Consolidation Act 1845 s 68 proviso; and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) paras 326, 329, 338.

21 *R Walker & Sons (a firm) v British Railways Board (Lancashire County Council, third party)* [1984] 2 All ER 249, [1984] 1 WLR 805. As to the extent of the statutory obligation see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) para 338.

22 See the Occupiers' Liability Act 1957 s 2; and NEGLIGENCE vol 78 (2010) PARA 29 et seq. Cf *Munro v Porthkerry Park Holiday Estates* [1984] LS Gaz R 1368 (owner of a licensed premises not liable when an intoxicated customer climbed over a fence and fell to his death down a cliff).

23 See the Occupiers' Liability Act 1984 s 1 (as amended); and NEGLIGENCE vol 78 (2010) PARA 40. Even if there is a duty to fence, the landowner incurs no liability for an accident if there is a finding of fact that the presence of a fence would not have deterred access to the land by the claimant: *Scott v Associated British Ports* (22 November 2000) Lexis, Enggen Library, Cases File, CA.

24 See para 958 post; and ANIMALS vol 2 (2008) PARA 754.

25 See para 955 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 475. As to the Defective Premises Act 1972 see also BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 77 et seq.

26 See eg *Rotherham Corpn v Fullerton* (1884) 50 LT 364.

27 See *R v Luton Roads Trustees* (1841) 1 QB 860. As to mandatory orders see JUDICIAL REVIEW vol 61 (2010) PARA 703 et seq.

UPDATE

948-950 Extent of duty to fence ... Statutory obligations to fence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

950 Statutory obligations to fence

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/(ii) Extent of Duty to Fence/951. Duty arising by agreement.

951. Duty arising by agreement.

The erection and repair of fences may be made the subject of an agreement[1]. Where part of an estate is being sold, it is important that the contract should state expressly who is to erect or maintain the boundary fence between the part sold and the part retained and that this provision be carried into the conveyance, for in the absence of such a provision neither party will be under any obligation to fence[2]. A covenant to fence or to maintain fences is a positive covenant, and therefore the burden of such a covenant entered into on the sale of land cannot run with the land so as to bind the assigns of the covenantor[3].

In leases, too, covenants for the erection and maintenance of fences are common[4]. A covenant to repair all the external parts of the demised premises renders the covenantor liable to repair a boundary wall adjoining other buildings[5]. In the absence of an express covenant, the tenant of premises let for a term of years, but not from year to year, is liable to repair fences as part of his liability for permissive waste[6], and for this purpose he is allowed, as between himself and his landlord, reasonable estovers[7]. The obligation under such a covenant is owed only to the other party, so a third party, for example a neighbour, is not entitled to sue in respect of a breach[8].

Though a covenant to fence does not bind successors in title to the covenantor unless contained in a lease, it may be that a duty to fence partakes of sufficient characteristics of an easement to lie in grant[9].

An agreement to fence may also, it seems, be implied. Thus in the case of an ancient inclosure it is a fair and reasonable presumption that the lord imposed as part of the terms on which the exclusive possession was to be granted to the incloser a stipulation that for the future he would take upon himself the duty of fencing as against the cattle of the commoners[10]; and an inclosure of the waste lands under an Inclosure Act does not put an end to the liability[11].

1 *Hilton v Ankesson* (1872) 27 LT 519; *Firth v Bowling Iron Co* (1878) 3 CPD 254; *Doe d Mence v Hadley* (1849) 14 LTOS 102; *Nussey v Provincial Bill Posting Co and Eddison* [1909] 1 Ch 734, CA. The development of 'open-plan' estates has meant the imposition of covenants restricting the erection of fences: see eg *Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402; *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267, [1971] 1 WLR 1062; *Harlow Development Corpn v Meyers* (1979) 249 EG 1283 (county court).

2 *Holbach v Warner* (1623) Cro Jac 665; *Barber v Whiteley* (1865) 34 LJQB 212. But see *Doyly v Drake* (1605) Moore KB 775, where four judges were equally divided in opinion on the question whether the vendor or the purchaser was under an obligation to fence. As to the consequences of failure to fence see paras 957-958 post.

3 *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL. See also *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403, CA; *Austerberry v Oldham Corpn* (1885) 29 ChD 750, CA; *Jones v Price* [1965] 2 QB 618 at 633, [1965] 2 All ER 625 at 630, CA, per Willmer LJ; but cf *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371; *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL; and note 9 infra. The common law rule also applies to a perpetual obligation under an inclosure award to keep a hedgerow in repair: *Marlton v Turner* [1998] 3 EGLR 185 (county court). A positive covenant in a lease entered into prior to 1996 is, however, in general enforceable as between the assigns of the lessor and lessee, if it touches or concerns the thing assigned: see *Spencer's Case* (1583) 5 Co Rep 16a. See also the Law of Property Act 1925 ss 78, 79, 141, 142; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 554 et seq. As to enforcement of covenants relating to tenancies entered into on or after 1 January 1996 see the Landlord and Tenant (Covenants) Act 1995; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 578 et seq. As to covenants running with the land see EQUITY.

4 As to implied agreements relating to fencing in the case of agricultural tenancies see para 948 note 11 ante; and AGRICULTURAL LAND.

5 *Green v Eales* (1841) 2 QB 225. If there is a covenant to repair the demised premises, it is a question of construction as to whether any boundary wall is included in the demised premises: *Blundell v Newlands Investment Trust* (1958) 172 EG 855. It would appear that a boundary fence or wall would not be included in the covenant implied by the Landlord and Tenant Act 1985 s 11 (as amended) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 416-420) into short residential lettings to keep in repair the structure and exterior of a dwelling house: cf *Brown v Liverpool Corpn* [1969] 3 All ER 1345, CA; *Hopwood v Cannock Chase District Council* [1975] 1 All ER 796, [1975] 1 WLR 373, CA.

6 *Cheetham v Hampson* (1791) 4 Term Rep 318; *Torriano v Young* (1833) 6 C & P 8. As to permissive waste see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 431 et seq.

7 Co Litt 41 b. Only felling of oak, ash and elm over 20 years old or other wood by local custom for immediate fencing requirements is permitted. As to estovers and the tenant's right to timber see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 187.

8 *Holgate v Bleazard* [1917] 1 KB 443. However, under the Animals Act 1971 s 5(6), a person whose livestock have strayed onto land in the ownership or occupation of another may plead as a defence to a claim under s 4 the breach of a fencing obligation owed by a third party having an interest in the claimant's land: see para 958 post; and ANIMALS vol 2 (2008) PARA 755.

9 *Jones v Price* [1965] 2 QB 618 at 639, [1965] 2 All ER 625 at 634, CA, per Diplock LJ ('The rationalisation ... is that [the duty to fence] can arise by prescription at common law, from which it must follow that, in theory, it is capable of being created by covenant or grant' though the form of such grant was, it was said, difficult to envisage); *Crow v Wood* [1971] 1 QB 77 at 84, [1970] 3 All ER 425 at 429, CA, per Lord Denning MR and at 86 and 430 per Edmund Davies LJ ('that a duty to fence can arise by express or implied grant seems clear'); *Egerton v Harding* [1975] QB 62 at 71, [1974] 3 All ER 689 at 694, CA, per Scarman LJ ('A duty to fence ... could arise by grant or custom'). For a contrary opinion see *Jones v Price* supra at 647 and 639 per Winn LJ ('Only a duty ... existing immemorially could possibly prevail'). There appears to be no case where it has been sought to establish an easement to fence by means of an express grant.

10 *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA. In that case, a duty to fence against a common was upheld; it was shown that there was an immemorial usage of fencing against the common as a matter of obligation and it was sufficient that this use could have arisen from a lawful origin which might have been an implied grant when the waste lands of the manor were inclosed or granted by way of copyhold, or by custom. As to duties arising by custom see para 953 post.

11 *Godfrey v Godfrey* (1470) YB 10 Edw 4 18; *Barber v Whiteley* (1865) 34 LJQB 212; *Egerton v Harding* [1975] QB 62 at 71, [1974] 3 All ER 689 at 694, CA, per Scarman LJ. Cf *Haigh v West* [1893] 2 QB 19, CA; *Sutcliffe v Holmes* [1947] KB 147, [1946] 2 All ER 599, CA.

952. Duty arising by prescription or implied grant.

A landowner[1] may be bound by prescription to maintain a sufficient[2] fence between his land and that of his neighbour[3]. In that case he is liable for all damage (for example, injuries sustained by straying animals) resulting from the defective state of the fence, subject only to the defence that the fence was damaged by act of God or vis major[4]. The servient owner is liable notwithstanding that he had no notice of the want of repair[5]. This right, which has been described as a 'spurious easement'[6], is not within the terms of the Prescription Act 1832[7], and, therefore, a prescriptive right to have a fence kept in repair must be made out according to one of the alternative methods[8].

To establish a prescriptive right according to the old common law[9] requires proof of exercise of the right from time immemorial, that is 1189[10]. Thus proof that the right did not exist, or could not have existed, at any moment of time since 1189 will defeat the claim. In practice, in the absence of such proof, long exercise of the right to call upon the servient owner as of right to repair his fence at his own expense may be sufficient to establish the easement[11]. The mere fact that the adjoining owner has for many years carried out repairs for the purpose of maintaining a fence between his land and that of his neighbour is no evidence of any legal obligation to repair, for such repairs may have been made solely for his own benefit[12].

Alternatively, a prescriptive right may be established under the doctrine of the lost modern grant[13].

A customary or prescriptive right to have a fence kept in order will pass as a right in the nature of an easement by implied grant on a conveyance, by virtue of the Law of Property Act 1925[14].

1 Where a tenant is in occupation, the remedy in the case of non-repair lies against the tenant and not the landlord: *Cheetham v Hampson* (1791) 4 Term Rep 318; *Lawrence v Jenkins* (1873) LR 8 QB 274.

2 It seems that the obligation is to have such a fence as is used in the locality for keeping out the animals usually found there: *Coaker v Willcocks* [1911] 2 KB 124, CA.

3 *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA; *Faldo v Ridge* (1605) Yelv 74; *Holbach v Warner* (1623) Cro Jac 665; *Star v Rookesby* (1710) 1 Salk 335; *Nowel v Smith* (1599) Cro Eliz 709; *Anon* (1674) 1 Vent 264; *Cheetham v Hampson* (1791) 4 Term Rep 318; *Boyle v Tamlyn* (1827) 6 B & C 329; *Lawrence v Jenkins* (1873) LR 8 QB 274; *Cordingley v Great Western Rly Co* (1948) 98 L Jo 35.

4 See the cases cited in note 3 supra. There is no requirement that prior notice of disrepair be given.

5 *Lawrence v Jenkins* (1873) LR 8 QB 274.

6 See Gale on Easements (4th Edn, 1868) p 460; (15th Edn, 1986) p 39 note 59, cited in *Jones v Price* [1965] 2 QB 618 at 635, [1965] 2 All ER 625 at 631, CA, per Willmer LJ, at 639 and 634 per Diplock LJ, and at 644 and 636 per Winn LJ and in *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 691, CA, per Scarman LJ. In *Jones v Price* supra, Willmer LJ at 618 and 633 referred to it as a quasi-easement.

7 As to prescription under the Prescription Act 1832 see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 99 et seq.

8 As to the methods of claiming prescriptive rights see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 75.

9 *Hilton v Ankesson* (1872) 27 LT 519; *Lawrence v Jenkins* (1873) LR 8 QB 274.

10 See further EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 81 et seq.

11 *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA; *Hilton v Ankesson* (1872) 27 LT 519; *Boyle v Tamlyn* (1827) 6 B & C 329; *Lawrence v Jenkins* (1873) LR 8 QB 274; cf *Barber v Whiteley* (1865) 34 LJQB 212. As to an obligation to repair a sea wall see *London and North Western Rly Co v Fobbing Levels Sewers Comrs* (1896) 66 LJQB 127.

12 *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA.

13 *Barber v Whiteley* (1865) 34 LJQB 212; *Sutcliffe v Holmes* [1947] KB 147, [1946] 2 All ER 599, CA. The question whether the doctrine of lost modern grant applied was in effect reserved in *Jones v Price* [1965] 2 QB

618 at 640, [1965] 2 All ER 625 at 634, CA, per Diplock LJ, but assumed in *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 691, CA, per Scarman LJ. See also *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA; *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA. See further EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 91 et seq.

14 See the Law of Property Act 1925 s 62; and *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA; cf *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609. See also EASEMENTS AND PROFITS A PRENDRE.

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953. Duty arising by custom.

Although it was once thought that an obligation to fence could not arise by custom[1], it has more recently been held that a duty to fence against another's land can arise in this way[2]. Where there is an immemorial usage of fencing against a common as a matter of obligation, the duty to fence is proved provided such a duty could have a lawful origin; custom may be one such origin[3].

1 *Polus v Henstock (Bolus v Hinstocke)* (1670) 1 Vent 97, 2 Keb 686; *Jones v Price* [1965] 2 QB 618 at 639, [1965] 2 All ER 625 at 633-634, CA, per Diplock LJ.

2 *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA.

3 See note 2 supra.

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954. Extinguishment of liability.

A man is not bound to fence against his own land[1], and therefore, where a man is bound to fence against adjoining land, his obligation to maintain the fences comes to an end when he purchases that land[2]. Further, if a duty to fence against adjoining land has been once extinguished by the unity of possession and ownership, it will not be revived by the lands afterwards passing into the hands of different persons[3]. In order, however, that a prescriptive right may be extinguished by unity of ownership, the two estates must be equal in duration, in quality, and in all other circumstances of right[4].

The liability of an owner to fence against adjoining land may also be extinguished by statutory authority, but only if he acts in strict accordance with the statute[5].

1 See para 948 ante.

2 *Sackville v Milward* (1444) YB 22 Hen 6 fo 7 pl 12; *Boyle v Tamlyn* (1827) 6 B & C 329 at 337.

3 *Polus v Henstock (Bolus v Hinstocke)* (1670) 1 Vent 97, 2 Keb 686.

4 *R v Hermitage Inhabitants* (1692) Carth 239 at 241. See EASEMENTS AND PROFITS A PRENDRE.

5 *Winter v Charter* (1829) 3 Y & J 308 (liability not extinguished when owner consented to highway authority breaking down part of fence prematurely).

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(iii) Liability for Dangerous Fences

955. Liability for dangerous fences.

A person whose fence is in such a state, whether by reason of its mode of construction or its disrepair, as to constitute a danger to occupiers of adjoining land or persons lawfully using the highway, is liable for any damage which may thereby result to such persons[1]. The adjoining owner may recover damages even if he has abated the nuisance by taking down the dangerous wall or fence with the consent of its owner[2].

Where a landlord has undertaken an obligation in a lease to a tenant for the maintenance or repair of a fence, or has reserved a right of entry to repair, then a duty is owed to all persons who might reasonably be expected to be affected by defects in the state of the fence to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a defect in the fence[3].

The owner of a cattle market who takes a toll for his own benefit is responsible if the fences of the cattle pens are in a dangerous condition, for example, spiked and of insufficient height, and the cattle are injured in consequence[4].

Local authorities and the Secretary of State are empowered to require the removal of any barbed wire which constitutes a nuisance to the highway[5].

If a retaining wall is to be constructed so that any cross-section of it will be within four yards of a street and any part of it will be more than four feet six inches higher than street level, plans, sections and specifications for it must first be approved by the local authority[6]. If any such retaining wall is in such condition as to be liable to endanger persons using the street, the local authority may require the owner or occupier to carry out work to obviate the danger[7].

1 See eg *Firth v Bowling Iron Co* (1878) 3 CPD 254 (owner liable when pieces of rusty fence fell into adjoining pasture and were eaten by cattle, causing their death; ground of liability not clear but probably nuisance); *Stewart v Wright* (1893) 9 TLR 480, DC (barbed wire fence adjoining a highway; nuisance); *Fenna v Clare & Co* [1895] 1 QB 199, DC (low wall topped with sharp spikes adjoining a highway; nuisance); *Harrold v Watney* [1898] 2 QB 320, CA (rotten fence adjoining highway; nuisance); *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, HL (blind man tripped over punner-hammer used as fence to excavation in pavement; negligence). Cf *Mann v Saulnier* (1959) 19 DLR (2d) 130 (NB App Div) (fence leaning over adjoining land by a few inches at its top held not to be trespass or nuisance in the absence of special damage). A fence erected adjoining a highway which has become so dilapidated as to constitute a nuisance may be a public nuisance under the Building Act 1984 ss 77, 78 (s 77 as amended): see BUILDING vol 4(2) (2002 Reissue) para 398. See also the Highways Act 1980 s 79 (as amended) (prevention of obstruction to the view at corners: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 502); s 154 (as amended) (overhanging hedges and trees: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 379); s 164 (barbed wire fences: see the text and note 5 infra; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 373); s 167 (as amended) (retaining walls near streets: see the text and notes 6-7 infra; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 282). See generally NEGLIGENCE; NUISANCE vol 78 (2010) para 173 et seq.

2 *Co-operative Wholesale Society Ltd v British Railways Board* (1995) Times, 20 December, CA (adjoining owner could recover the cost of demolition of the dangerous wall but not the cost of rebuilding it in the absence of any duty to fence).

3 See the Defective Premises Act 1972 s 4(1), (4); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 475.

4 *Lax v Darlington Corpn* (1879) 5 ExD 28, CA. As to markets and fairs generally see MARKETS, FAIRS AND STREET TRADING. As to injuries to cattle see also paras 944 ante, 957 post.

5 See the Highways Act 1980 s 164; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 373. Mere apprehension of injury from barbed wire does not give an adjoining occupier a right to damages: *Meara v Daly* (1914) 48 ILT 223. As to the Secretary of State see para 946 note 1 ante.

6 See the Highways Act 1980 s 167(1), (2); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 282.

7 See ibid s 167(5); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 282.

UPDATE

955 Liability for dangerous fences

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/ (iv) Liability for Failure to Fence/956. Damages for breach of covenant.

(iv) Liability for Failure to Fence

956. Damages for breach of covenant.

Where there has been a breach of a covenant to build a wall, the measure of damages awarded to a claimant covenantee is the cost to the claimant of erecting on his own land a boundary wall of the contract specification, provided that the intention to execute the work is genuine and reasonable[1]. The cost is assessed at the date of judgment unless the claimant should have taken action, or done the work, at an earlier date[2]. The cost of construction is not the absolute measure of damages; so if the claimant declines specific performance and elects a remedy in damages, and there is no likelihood that the wall will be ever built, then the measure of damages is the actual loss to the claimant, namely the diminution in the value of the adjoining land[3].

1 *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262 (as the covenant specified a wall, the defendant could not argue that damages should be limited to the cost of the cheapest possible fence). The court, in such a case, may insist on an undertaking from the claimant to build the wall with the money awarded: *Radford v De Froberville* supra at 54 and 1283 per Oliver J; *Wigsell v School for Indigent Blind* (1880) 43 LT 218 at 222. As to the measure of damages for breach of contract see DAMAGES vol 12(1) (Reissue) para 941 et seq.

2 *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Johnson v Agnew* [1980] AC 367 at 401, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433.

3 *Wigsell v School for Indigent Blind* (1882) 8 QBD 357, DC; *Tito v Waddell (No 2)* [1977] Ch 106 at 334, [1977] 3 All ER 129 at 318 per Megarry V-C; *Radford v De Froberville* [1978] 1 All ER 33 at 46-55, [1977] 1 WLR

1262 at 1274-1285 per Oliver J. As to the circumstances in which specific performance will be granted of a covenant to build see *Wolverhampton Corpn v Emmons* [1901] 1 KB 515, CA; *Carpenters Estates Ltd v Davies* [1940] Ch 160, [1940] 1 All ER 13; and SPECIFIC PERFORMANCE.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/ (iv) Liability for Failure to Fence/957. Consequences of neglect to fence where there is a duty to fence.

957. Consequences of neglect to fence where there is a duty to fence.

Where there is a specific duty to fence, breach of that duty may give rise to a claim for damages[1] or possibly for specific performance[2] or an injunction[3] at the suit of the person to whom that duty is owed[4]. Liability for the breach may also extend to consequential damage. Thus a person under an obligation to fence for the benefit of the adjoining owner who fails to do so may be liable if the animals of the adjoining owner[5], lawfully on the adjoining land[6], stray onto his land and are there injured[7]. However, what constitutes a fence is a matter of construction of the fencing obligation[8]. Conversely, a person under an obligation to fence who is in breach of that obligation cannot avail himself of the statutory right of action[9] when livestock belonging to any other person stray onto his land and damage it, if it is shown that the livestock would not have strayed onto his land but for his breach of the fencing obligation[10]. Where animals do stray in such circumstances, it has been held that the landowner is not justified in simply driving them off his own land: he must return them to the close from which they escaped by his default[11].

1 See para 956 ante; and DAMAGES.

2 See para 956 ante; and SPECIFIC PERFORMANCE.

3 See para 949 ante; and CIVIL PROCEDURE.

4 *Ricketts v East and West India Docks etc Rly Co* (1852) 12 CB 160; *Dawson v Midland Rly Co* (1872) LR 8 Exch 8, where it was held that the obligation on railway companies under the Railways Clauses Consolidation Act 1845 s 68 (see para 950 ante; and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) paras 326, 337-338) is only to fence as against the owners and occupiers of adjoining land and persons claiming under them.

5 The principle extends to animals of which the adjoining owner is only a gratuitous bailee: *Rooth v Wilson* (1817) 1 B & Ald 59. Cf *Broadwater v Blot* (1817) Holt NP 547. See further BAILMENT.

6 See the notes to *Pomfret v Ricroft* (1669) 1 Wms Saund 321 at 322. Thus a licensee with a right to graze land could recover as occupier of that land: *Dawson v Midland Rly Co* (1872) LR 8 Exch 8.

7 *Powell v Salisbury* (1828) 2 Y & J 391; *Anon* (1674) 1 Vent 264; *M'Morrow v Layden* [1919] 2 IR 398; *Rooth v Wilson* (1817) 1 B & Ald 59.

8 *Ellis v Arnison* (1822) 1 B & C 70. Cf *Coaker v Willcocks* [1911] 2 KB 124, CA (no liability to fence against Scottish sheep on Dartmoor as compared with local sheep); *Cooper v Railway Executive (Southern Region)* [1953] 1 All ER 477, [1953] 1 WLR 223 (no liability when fence was strong enough for all normal purposes).

9 See the Animals Act 1971 s 4; and ANIMALS vol 2 (2008) PARA 755. See also para 958 post.

10 See ibid s 5(1), (6); and ANIMALS vol 2 (2008) PARA 755. See also para 958 post.

11 *Carruthers v Hollis* (1838) 8 Ad & El 113.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/ (iv) Liability for Failure to Fence/958. Consequences of neglect to fence where there is no duty to fence.

958. Consequences of neglect to fence where there is no duty to fence.

Even where there is no specific duty to fence[1], an owner or occupier of land may be liable in negligence[2] for damage or injury sustained by others because there is no fence[3] or it is inadequate or defective[4].

It may therefore be necessary to fence to fulfil adequately the duty of care owed to lawful visitors under the Occupiers' Liability Act 1957 or the duty owed to persons other than visitors under the Occupiers' Liability Act 1984[5].

Under the Animals Act 1971 it may be necessary to fence to keep in livestock, as the owner of livestock is generally liable for any damage the animals may cause[6], and it is no defence that the person who suffered the damage could have prevented it by fencing unless he, or any other person having an interest in the land, had a duty to fence[7] and the livestock would not have strayed but for a breach of that duty[8]. There is also a duty to take care to prevent damage from animals straying on the highway so that, having regard to the nature of the animals, fencing may be required to fulfil this duty; but the Act does provide that where a person places animals on certain unfenced land and has the right to do so, he is not to be regarded as being in breach of his duty of care merely by reason of having placed them there[9].

1 As to the consequences of neglect to fence where there is a duty to fence see para 957 ante.

2 See NEGLIGENCE.

3 *Hurst v Taylor* (1885) 14 QBD 918, DC (person injured by straying off a public footpath at a point of diversion where no fence had been erected by the defendant who had effected the diversion under statutory powers).

4 See eg *Hilder v Associated Portland Cement Manufacturers Ltd* [1961] 3 All ER 709, [1961] 1 WLR 1434. See also *Rylands v Fletcher* (1868) LR 3 HL 330; and NUISANCE vol 78 (2010) PARA 148 et seq.

5 As to the duty of care see NEGLIGENCE vol 78 (2010) PARA 29 et seq.

6 See the Animals Act 1971 s 4(1); and ANIMALS vol 2 (2008) PARA 755.

7 It is not clear whether, to negative liability, the duty to fence has to be one owed to the possessor of the livestock or whether a duty to a third party, eg a landlord or an adjoining owner, would suffice. In the latter event, this provision would appear to reverse the principles applied in *Holgate v Bleazard* [1917] 1 KB 443 and in *Sackville v Milward* (1444) YB 22 Hen 6 fo 7 pl 12. It appears, however, that the Animals Act 1971 has not abrogated the rule that where a person puts his livestock into his own field and they escape into the field of an adjoining owner and thence into the field of a third party, in an action by the third party (which would now be under the Animals Act 1971 s 4) the owner of the livestock cannot set up as a defence that the adjoining owner was in breach of a duty to fence owed to him (see *Anon* (1470) YB 10 Edw 4 fo 7 pl 19; *Sutcliffe v Holmes* [1947] KB 147 at 154-156, [1946] 2 All ER 599 at 602-603, CA, per Somervell LJ). In such a case the owner of the livestock may have a right of recourse against the adjoining owner: *Holbach v Warner* (1623) Cro Jac 665; *Right v Baynard* (1674) Freem KB 379 at 380 per Twisden J.

8 See the Animals Act 1971 s 5(1), (6); and ANIMALS vol 2 (2008) PARA 755.

9 See ibid s 8; and ANIMALS vol 2 (2008) PARA 754.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/(v) Enforcing Covenants not to Fence/959. Enforcing covenants not to fence.

(v) Enforcing Covenants not to Fence

959. Enforcing covenants not to fence.

A restrictive covenant not to fence is enforceable in accordance with standard principles[1]. A mandatory injunction will normally be given without the need to show that the claimant has suffered loss[2], although there is a discretion to refuse to grant such an injunction[3].

1 See CIVIL PROCEDURE; EQUITY. See also DAMAGES vol 12(1) (Reissue) para 1126.

2 *Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402. See also *Shepherd Homes Ltd v Sandham (No 2)* [1971] 2 All ER 1267, [1971] 1 WLR 1062; *Harlow Development Corpn v Meyers* (1979) 249 EG 1283 (county court).

3 *Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402 (mandatory injunction on a motion to remove a fence refused partly because of delay and partly because of the high degree of assurance required that at trial it would appear that the injunction was rightly granted). The concept, however, of using judicial discretion to produce a fair result has been doubted in *Charrington v Simons & Co Ltd* [1971] 2 All ER 588 at 592, [1971] 1 WLR 598 at 603 per Russell LJ.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/3. TREES AND FENCES/(2) RIGHTS, DUTIES AND LIABILITIES OF OWNERS OF FENCES/(vi) Fences and Planning Law/960. Permitted development.

(vi) Fences and Planning Law

960. Permitted development.

In general, subject to the fulfilment of certain conditions, development consisting of the erection or construction of gates, fences, walls or other means of enclosure not exceeding one metre in height where abutting on a highway used by vehicular traffic or two metres in height in any other case, and their maintenance, improvement or alteration, is permitted by development orders made under the Town and Country Planning Act 1990 and may be undertaken without specific permission[1].

1 See the Town and Country Planning Act 1990 s 59; the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, art 3, Sch 2 Pt 2 Class A; and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) paras 236, 252 et seq. The fence or wall must operate as a means of enclosure but the fact that it has some other purpose (eg retaining soil) does not deprive it of the statutory privilege: *Prengate Properties Ltd v Secretary of State for the Environment* (1973) 25 P & CR 311.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(1) INTRODUCTION/961. In general.

4. PARTY WALLS

(1) INTRODUCTION

961. In general.

The law relating to party walls is now an amalgam of common law rules[1] and the statutory regime of the Party Wall etc Act 1996[2]. This statutory regime governing the rights of adjoining owners[3] has superseded rights of support based on common law or prescription[4], provided that the provisions of the Act are complied with[5]. Where the procedures of the Act are invoked, the common law rights and obligations do not apply[6], and a person who wishes to do any work in relation to a party wall as defined by the Act will have only the rights given by the Act and no other rights[7]. The common law rules and remedies will now only apply in those situations not covered by the Act or where the procedures of the Act are not followed[8].

The Party Wall etc Act 1996, in substance, extends the regime previously applicable only to London under the London Building Acts (Amendment) Act 1939[9] to the whole of England and Wales[10]. The wording of the Party Wall etc Act 1996 is not identical to that formerly contained in the London Building Acts (Amendment) Act 1939, but the provisions are very similar. Decisions on that Act and its statutory antecedents[11] will therefore be relevant to the interpretation of the Party Wall etc Act 1996 except where the new wording compels an alternative meaning.

1 As to common law rights and duties in relation to party walls see para 972 et seq post.

2 The Party Wall etc Act 1996 was brought into force, subject to savings, on 1 July 1997: see s 22(1), (2), (3); and the Party Wall etc Act 1996 (Commencement) Order 1997, SI 1997/670. The Party Wall etc Act 1996 extends to England and Wales only (see s 22(4)), but its provisions do not apply to land which is situated in inner London and in which there is an interest belonging to the Honourable Society of the Inner Temple, the Honourable Society of the Middle Temple, the Honourable Society of Lincoln's Inn, or the Honourable Society of Gray's Inn (see s 18(1)). For these purposes, 'inner London' means Greater London other than the outer London boroughs: s 18(2). As to the outer London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) para 30. The provisions of the Party Wall etc Act 1996 apply to land in which there is an interest belonging to Her Majesty in right of the Crown, an interest belonging to a government department, or an interest held in trust for Her Majesty for the purposes of any such department: s 19(1). They also apply to land which is vested in, but not occupied by, Her Majesty in right of the Duchy of Lancaster, and to land which is vested in, but not occupied by, the possessor for the time being of the Duchy of Cornwall: s 19(2). As to land in which the Crown has an interest see CROWN PROPERTY.

As to statutory rights, duties and procedures in relation to party walls see para 979 et seq post. Any sum payable in pursuance of the Party Wall etc Act 1996 (otherwise than by way of fine) is recoverable summarily as a civil debt: s 17.

3 For the meaning of 'adjoining owner' see para 966 note 5 post.

4 As to rights of support see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 180 et seq. As to prescription see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 74 et seq.

5 See *Louis v Sadiq* [1997] 1 EGLR 136, CA, which was decided in relation to the London Building Acts (Amendment) Act 1939 (defendant committed an actionable nuisance and had failed to invoke the statutory procedures; a subsequent statutory notice could not enable him to take advantage of the statutory defence). Cf *Selby v Whitbread & Co* [1917] 1 KB 736, which was decided in relation to the London Building Act 1894 (where it was held that the Act was in substitution for the common law and formed a governing and exhaustive code when its procedures were validly invoked).

6 *Louis v Sadiq* [1997] 1 EGLR 136, CA; *Upjohn v Seymour Estates Ltd* (1938) 54 TLR 465. The cases cited supra were decided in relation to earlier similar legislation.

7 See *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 at 73-74; *Lewis and Solome v Charing Cross, Euston and Hampstead Rly Co* [1906] 1 Ch 508 at 516-517. See further paras 972, 979 post. He cannot choose to rely on the very limited rights available at common law and so avoid the statutory procedures: see *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 (the construction of a basement necessitated the cutting away and strengthening of the foundations to a party wall held in common, an action permitted at common law, but it was held that the statutory procedures applied and notice had to be served). The cases cited supra were all decided in relation to earlier similar legislation.

8 See *Upjohn v Seymour Estates Ltd* as reported in (1938) 54 TLR 465 (work commenced before any award under the London Building Act 1930 so common law remedies applied); *Burlington Property Co Ltd v Odeon Theatres Ltd* [1939] 1 KB 633, [1938] 3 All ER 469, CA; *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 295, [1974] 1 WLR 123 (award in excess of jurisdiction and after procedural irregularities enabled

adjoining owner to seek remedy at common law); *London and Manchester Assurance Co Ltd v O and H Construction Ltd* [1989] 2 EGLR 185 (mandatory orders to remove a structure erected on the site of a demolished party wall without employing the procedures of the London Building Acts).

9 Ie under the London Building Acts (Amendment) Act 1939 Pt VI (ss 44-59), which has been repealed: see the Party Wall etc Act 1996 s 21; and the Party Wall etc Act 1996 (Repeal of Local Enactments) Order 1997, SI 1997/671. As to the London Building Acts (Amendment) Act 1939 see further BUILDING vol 4(2) (2002 Reissue) para 302.

10 See note 2 supra. The purpose of the Party Wall etc Act 1996 was stated in Parliament to be to extend the tried and tested provisions of the London Building Acts to the whole of England and Wales: see 568 HL Official Report (5th series), 31 January 1996, col 1536.

11 The London Building Acts (Amendment) Act 1939 Pt VI (now repealed) consolidated provisions from earlier London Building Acts. As to the London Building Acts see BUILDING vol 4(2) (2002 Reissue) paras 301-302.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(1) INTRODUCTION/962. Meaning of 'party wall' at common law.

962. Meaning of 'party wall' at common law.

The term 'party wall' may be used in a number of different senses[1]. At common law, the term may now be used in relation to: (1) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two adjoining properties[2]; (2) a wall divided vertically into two strips, one belonging to each of the adjoining owners[3]; (3) a wall divided vertically into halves, each half being subject to a cross easement in favour of the owner of the other half[4].

Prior to 1926, there was a fourth category of party wall at common law, namely a wall of which two adjoining owners were tenants in common[5]; but a tenancy in common of land can no longer exist as a legal estate[6]. In cases where a wall was held in common before 1926, and in cases of a disposition or other arrangement made after 1925 under which a tenancy in common would be created, if such a holding were permissible, the wall is severed vertically as between the respective owners; and the owner of each part has such rights to support and user[7] over the rest of the wall or structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been in existence or had been created[8]. The effect of the Law of Property Act 1925 is therefore to substitute for this obsolete meaning of 'party wall' a holding in which the wall is severed vertically as in head (3) above, although the owners have rights corresponding to those under the former law[9]. Such party walls can therefore now be treated as party walls falling within head (3) above.

A wall may be in part of its length and height a party wall and as regards the rest an external wall[10].

1 Four categories of party wall were enumerated in *Watson v Gray* (1880) 14 ChD 192 at 194 per Fry J. One is now obsolete: see the text and notes 5-6 infra.

See also *Weston v Arnold* (1873) 8 Ch App 1084 at 1089 per James LJ ('a party wall is a thing which belongs to two persons as part owners, or divides two buildings one from another').

For the meaning of 'party wall' for the purposes of the Party Wall etc Act 1996 see para 963 post.

2 *Watson v Gray* (1880) 14 ChD 192 at 195 per Fry J. As to the extent of this right see para 973 post. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

3 *Matts v Hawkins* (1813) 5 Taunt 20.

4 *Jones v Pritchard* [1908] 1 Ch 630; *Bradburn v Lindsay* [1983] 2 All ER 408. See also the Law of Property Act 1925 s 38(1); and the text and note 8 infra.

5 *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404; *Cubitt v Porter* (1828) 8 B & C 257. See also *Mason v Fulham Corpn* [1910] 1 KB 631 at 637, DC. The four categories of party wall were enumerated in *Watson v Gray* (1880) 14 ChD 192 at 194 per Fry J: see note 1 supra.

6 See the Law of Property Act 1925 ss 1(6), 34(2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) para 207.

7 See *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541; *Upjohn v Seymour Estates Ltd* [1938] 1 All ER 614 (right to support of a party wall included right to protection from exposure to the elements that withdrawal of such support entailed). In *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA, the existence of an easement of shelter or protection from the weather was denied. However, this case did not relate to a party wall but to an external wall built to abut the external wall of an adjoining property; and it was distinguished in *Rees v Skerrett* supra. See also *Bradburn v Lindsay* [1983] 2 All ER 408.

8 See the Law of Property Act 1925 ss 38(1), 39(5), Sch 1 Pt V para 1; and REAL PROPERTY vol 39(2) (Reissue) para 62.

9 As to the incidents of such a holding see para 976 post.

10 *Weston v Arnold* (1873) 8 Ch App 1084 at 1090; *Drury v Army and Navy Auxiliary Co-operative Supply Ltd* [1896] 2 QB 271, DC; *Newton v Huggins & Co Ltd* (1906) 50 Sol Jo 617; and see *Colebeck v Girdlers Co* (1876) 1 QBD 234; *Knight v Pursell* (1879) 11 ChD 412; *London, Gloucestershire and North Hants Dairy Co v Morley and Lanceley* [1911] 2 KB 257, DC; *Dean v Walker* (1996) 73 P & CR 366, CA. See also *Johnston v Mayfair Property Co* [1893] WN 73.

963. Statutory definition of 'party wall' etc.

For the purposes of the Party Wall etc Act 1996, 'party wall' means:

1 (1) a wall which forms part of a building[1] and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests[2]; and
2 (2) so much of a wall not being a wall referred to in head (1) above as separates buildings belonging to different owners[3].

A wall which is not part of a building but which stands on lands of different owners and which is used or constructed to be used for separating adjoining lands is defined for the purposes of the Act as a 'party fence wall', but this does not include a wall constructed on the land of one owner the artificially formed support of which projects into the land of another owner[4].

For the purposes of the Act, 'party structure' means a party wall and also a floor partition or other structure separating buildings or parts of buildings approached solely by separate staircases or separate entrances[5].

1 'Building' is not defined in the Party Wall etc Act 1996; however, it seems that it may be given a wide meaning: see *Frederick Betts Ltd v Pickfords Ltd* [1906] 2 Ch 87 (where it was held that a covered yard or cart shed was a building and the wall was consequently a party wall within the London Building Act 1894). This case was decided in relation to earlier similar legislation (see para 961 ante).

2 Party Wall etc Act 1996 s 20. Thus if only the foundations of the wall project across the line of junction or boundary, then the wall is not a party wall for the purposes of Act unless it separates buildings belonging to two different owners (see head (2) in the text). For the meaning of 'owner' see para 965 note 2 post.

3 Ibid s 20. See also *Knight v Pursell* (1879) 11 ChD 412 at 414 per Fry J (where it was suggested that a party wall is defined by reference to mode of use rather than rights of ownership). It has been held that if an adjoining

owner connects without authority into an external boundary wall constructed entirely on the land of his neighbour, then an injunction will lie to order a disconnection from the building so that it ceases to be a party wall: *Frederick Betts Ltd v Pickfords Ltd* [1906] 2 Ch 87. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

4 Party Wall etc Act 1996 s 20. A party fence wall is a party wall at common law in either the second or third sense: see para 962 head (2) or head (3) ante.

5 Ibid s 20. The effect of this definition is to extend the application of the Act from the vertical boundaries to horizontal boundaries between flats.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(1) INTRODUCTION/964. External walls and fence walls adjoining boundaries.

964. External walls and fence walls adjoining boundaries.

A wall in single ownership that does not divide buildings is not a party wall[1] or party fence wall[2] for the purposes of the Party Wall etc Act 1996[3]. Such walls may be boundary walls in the sense that they stand alongside the boundary of a property and delimit it. They will be either external walls or fence walls[4]. The building of such walls can carry the right to place below the level of the land of the adjoining owner necessary footings and foundations[5].

1 For the statutory meaning of 'party wall' see para 963 ante.

2 For the meaning of 'party fence wall' see para 963 ante.

3 Such a wall may, however, be a party wall at common law within the first sense if subject to an easement in favour of the adjoining owner: see para 962 head (1) ante.

4 These terms are used in the Party Wall etc Act 1996 (see eg s 1(4); and para 966 head (2) post), although they are not expressly defined.

'External wall' appears to mean the outside wall of a building. For the purposes of the London Building Act 1930, 'external wall' is defined as the outer wall or vertical enclosure of any building not being a party wall: see s 5. See also *Pembery v Lamdin* [1940] 2 All ER 434 (decided in relation to a landlord's covenant to keep external walls in tenantable repair), in which it was held that an external wall is one that forms part of the enclosure of a premises.

'Fence wall' appears to mean a wall designed to fence off property, ie a wall that would be a party fence wall if it had been constructed to stand on lands of different owners (see para 963 ante).

5 See para 967 post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/965. Introduction of statutory procedures.

(2) CREATION OF PARTY WALLS

965. Introduction of statutory procedures.

The Party Wall etc Act 1996 provides procedures[1] for situations where lands of different owners[2] adjoin and are not built on at the line of junction[3], or are built on at the line of junction only to the extent of a boundary wall[4] (not being a party fence wall[5] or the external wall[6] of a building)[7], and either owner is about to build on any part of the line of junction[8].

1 Ie by virtue of the Party Wall etc Act 1996 s 1: see paras 966-967 post. As to the Party Wall etc Act 1996 generally see para 961 ante.

2 'Owner' includes: (1) a person in receipt of, or entitled to receive, the whole or part of the rents or profits of land; (2) a person in possession of land, otherwise than as a mortgagee or as a tenant from year to year or for a lesser term or as a tenant at will; and (3) a purchaser of an interest in land under a contract for purchase or under an agreement for a lease, otherwise than under an agreement for a tenancy from year to year or for a lesser term: ibid s 20. It has been held that 'owner' does not include a statutory tenant: see *Frances Holland School v Wassef* [2001] 2 EGLR 88 (county court) (a case decided in relation to earlier similar legislation: see para 961 ante).

3 Party Wall etc Act 1996 s 1(1)(a). 'Line of junction' is not defined in the Party Wall etc Act 1996, but is used throughout the Act to refer to the non-physical boundary line between adjoining properties.

4 'Boundary wall' is not defined in the Party Wall etc Act 1996, but appears to mean a wall marking a boundary whether or not it stands on, or adjoins, the boundary.

5 For the meaning of 'party fence wall' see para 963 ante.

6 As to the meaning of 'external wall' see para 964 note 4 ante.

7 Party Wall etc Act 1996 s 1(1)(b).

8 Ibid s 1(1).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/966. Statutory procedure where one owner wishes to build a party wall or party fence wall.

966. Statutory procedure where one owner wishes to build a party wall or party fence wall.

A building owner[1] who desires to build a party wall[2] or party fence wall[3] on the line of junction[4] must, at least one month before he intends the building work to start, serve on any adjoining owner[5] a notice which indicates his desire to build and describes the intended wall[6].

After having been served with a notice of desire to build, an adjoining owner may serve on the building owner a notice indicating his consent to the building of a party wall or party fence wall[7]. If such a consent notice is served, then the wall must be built half on the land of each of the two owners or in such other position as may be agreed between them[8]. The expense of building the wall is shared between the two owners, in such proportion as has regard to the use made or to be made of the wall by each of them and to the cost of labour and materials prevailing at the time when that use is made by each owner respectively[9].

If the adjoining owner does not consent[10] to the building of a party wall or party fence wall, the building owner may only build the wall:

3 (1) at his own expense[11]; and
4 (2) as an external wall[12] or a fence wall[13], as the case may be, placed wholly on his own land[14].

Where the building owner builds such a wall wholly on his own land he has the right to place below the level of the land of the adjoining owner such projecting footings and foundations[15] as are necessary for the construction of the wall[16]. The building owner must compensate any adjoining owner and any adjoining occupier[17] for any damage to his property occasioned by the building of the wall[18] and by the placing of any such necessary footings or foundations[19].

The Party Wall etc Act 1996 provides for the determination of any dispute that arises under these provisions between the building owner and any adjoining owner or occupier[20].

1 'Building owner' means an owner of land who is desirous of exercising rights under the Party Wall etc Act 1996: s 20. See *Lehmann v Herman* [1993] 1 EGLR 172 (where a husband and wife were joint tenants and both together constituted the 'building owner'; therefore a notice served on behalf of only one of two or more joint tenants is not served by the building owner and is invalid). This case was decided in relation to earlier similar legislation (see para 961 ante).

2 For the statutory meaning of 'party wall' see para 963 ante.

3 For the meaning of 'party fence wall' see para 963 ante.

4 As to the meaning of 'line of junction' see para 965 note 3 ante.

5 'Adjoining owner' means any owner of land, buildings, storeys or rooms adjoining those of the building owner: Party Wall etc Act 1996 s 20. If there is more than one adjoining owner of the same land, such as a freeholder and long leaseholder, or freeholder and tenant for a term exceeding a year, both must be served: see *Fillingham v Wood* [1891] 1 Ch 51. It has been held that service upon only one of two or more joint tenants is sufficient: see *Crosby v Alhambra Co Ltd* [1907] 1 Ch 295. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

6 Party Wall etc Act 1996 s 1(2). As to when s 1 applies see para 965 ante.

7 Ibid s 1(3). There is no time limit under s 1(3) on serving a consent notice, but cf the time limit under s 1(4) (see note 10 infra).

Since a consent notice will have the consequence of requiring the adjoining owner to share the costs of building (see the text and note 9 infra), consent is only likely to be forthcoming if a party wall is advantageous to the adjoining owner.

8 Ibid s 1(3)(a).

9 Ibid ss 1(3)(b), 11(3).

10 For these purposes, 'consent' means consent by a notice served within the period of 14 days beginning with the day on which the notice described in ibid s 1(2) (see the text and note 6 supra) is served: s 1(4). An adjoining owner who does not consent to the building of a party wall or party fence wall need take no action.

11 Ibid s 1(4)(a), (7).

12 As to the meaning of 'external wall' see para 964 note 4 ante.

13 As to the meaning of 'fence wall' see para 964 note 4 ante.

14 Party Wall etc Act 1996 s 1(4)(b).

15 'Foundation', in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests: ibid s 20. 'Special foundations' means foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load: s 20.

16 Ibid s 1(6). The right is exercisable at any time in the period which begins one month after the day on which the notice was served on the adjoining owner, and ends 12 months after that day: s 1(6)(a), (b).

17 'Adjoining occupier' means any occupier of land, buildings, storeys or rooms adjoining those of the building owner: ibid s 20.

18 Ibid s 1(7)(a).

19 Ibid s 1(7)(b).

20 Any such dispute is to be determined in accordance with ibid s 10 (see paras 985-987 post): see s 1(8).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/967. Statutory procedure where one owner wishes to build a wall adjacent to the boundary.

967. Statutory procedure where one owner wishes to build a wall adjacent to the boundary.

A building owner[1] who desires to build on the line of junction[2] a wall placed wholly on his own land must, at least one month before he intends the building work to start, serve on any adjoining owner[3] a notice which indicates his desire to build and describes the intended wall[4]. Where the building owner builds such a wall wholly on his own land he has the right to place below the level of the land of the adjoining owner such projecting footings and foundations[5] as are necessary for the construction of the wall[6]. The building owner must build the wall at his own expense[7] and must compensate any adjoining owner and any adjoining occupier[8] for any damage to his property occasioned by the building of the wall[9] and by the placing of any such necessary footings or foundations[10].

The Party Wall etc Act 1996 provides for the determination of any dispute that arises under these provisions between the building owner and any adjoining owner or occupier[11].

1 For the meaning of 'building owner' see para 966 note 1 ante.

2 As to the meaning of 'line of junction' see para 965 note 3 ante.

3 For the meaning of 'adjoining owner' see para 966 note 5 ante.

4 Party Wall etc Act 1996 s 1(5). As to when s 1 applies see para 965 ante. Such a boundary wall is not a party wall or a party fence wall for the purposes of the Act nor a party wall at common law. For the statutory meaning of 'party wall' see para 963 ante. For the meaning of 'party fence wall' see para 963 ante. As to the meaning of 'party wall' at common law see para 962 ante. The reason for invoking the procedures of the Act will be to obtain the right to project foundations and footings (see the text and notes 5-6 infra) and to obtain the ancillary rights of entry which may be necessary to build the wall. As to rights of entry see para 984 post. As to restrictions on excavation and construction adjacent to a boundary see para 982 post.

No notice need be served if the footings and foundations are to be on the land of the building owner, but this may effectively result in an abandonment of a narrow strip of land to the adjoining owner (see eg *Burns v Morton* [1999] 3 All ER 646, [2000] 1 WLR 247, CA). See also para 903 ante.

5 For the meaning of 'foundation' see para 966 note 15 ante.

6 Party Wall etc Act 1996 s 1(6). The right is exercisable at any time in the period which begins one month after the day on which the notice was served on the adjoining owner, and ends 12 months after that day: s 1(6)(a), (b).

7 Ibid s 1(7).

8 For the meaning of 'adjoining occupier' see para 966 note 17 ante.

9 Party Wall etc Act 1996 s 1(7)(a).

10 Ibid s 1(7)(b).

11 Any such dispute is to be determined in accordance with ibid s 10 (see paras 985-987 post): see s 1(8).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/968. Creation of party walls in single ownership.

968. Creation of party walls in single ownership.

A party wall at common law[1] in single ownership will rarely be created expressly since an owner is not restricted unless and until the adjoining owner acquires rights over it. Until such rights are proved the wall will not rank as a party wall at common law and will only be a party wall to the extent agreed or used and no further[2]. Such rights can be created by agreement or by prescription[3]. If a boundary wall belonging to one owner is used for support by the adjoining owner for the necessary period and there is a resulting prescriptive easement of support, then the wall will be a party wall of this type[4].

A party wall of this type will not qualify as a party wall for the purposes of the Party Wall etc Act 1996[5] unless it separates buildings belonging to different owners[6], nor will it be a party fence wall[7].

1 As to the meaning of 'party wall' at common law see para 962 ante.

2 *Weston v Arnold* (1873) 8 Ch App 1084 at 1090; *Drury v Army and Navy Auxiliary Co-operative Supply Ltd* [1896] 2 QB 271, DC; *Newton v Huggins & Co Ltd* (1906) 50 Sol Jo 617; *London, Gloucestershire and North Hants Dairy Co v Morley and Lanceley* [1911] 2 KB 257, DC.

3 As to prescription see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 74 et seq.

4 A party wall of this type, where the wall belongs entirely to one owner, subject to an easement of support in favour of the other, may have occurred in *Sheffield Improved Industrial and Provident Society v Jarvis* [1871] WN 208. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

5 For the statutory meaning of 'party wall' see para 963 ante. It may become a party wall for the purposes of the Party Wall etc Act 1996 if it is the external wall of a building and the adjoining owner constructs a building against it but perhaps only if the parties so agree or if by the passage of time the adjoining owner can claim adverse possession of the surface of the wall. As to adverse possession see LIMITATION PERIODS vol 68 (2008) PARA 1078 et seq.

6 See para 963 head (2) ante.

7 For the meaning of 'party fence wall' see para 963 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/969. Creation of party walls divided vertically.

969. Creation of party walls divided vertically.

Where a wall is built on the boundary of two adjoining pieces of land, so that the centre of the wall coincides with the boundary line, the property in the wall follows the property in the land upon which it stands and the wall prima facie is a party wall at common law in the second sense[1]. It is a question of fact whether a party wall is fairly built half on each side of the boundary, and any minute inaccuracy of measurement will be disregarded[2]. In such a case, even if the wall was constructed at the joint expense of the neighbouring owners, it is not subject to joint ownership[3].

For the purposes of the Party Wall etc Act 1996, this type of wall is at least a party fence wall[4] but if the wall also separates buildings belonging to different owners, it will be a party wall[5].

1 As to party walls in the second sense see para 962 head (2) ante. See also *Matts v Hawkins* (1813) 5 Taunt 20; *Hutchinson v Mains* (1832) Alc & N 155. Cf *Waddington v Naylor* (1889) 60 LT 480; *Mayfair Property Co v Johnston* [1894] 1 Ch 508. However, an easement of support for one half of the wall by the other may be acquired by prescription or by grant, express, implied or presumed: see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; and EASEMENTS AND PROFITS A PRENDRE. It is thought that this type of party wall will be rare since reciprocal easements will often be implied or presumed. As to the creation of party walls subject to reciprocal easements see para 970 post.

2 *Reading v Barnard* (1827) Mood & M 71.

3 *Matts v Hawkins* (1813) 5 Taunt 20. Separate ownership of the two halves, with express cross-easements of support, was suggested in a note to *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404, as a means of avoiding this type of party wall.

4 For the meaning of 'party fence wall' see para 963 ante.

5 For the statutory meaning of 'party wall' see para 963 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/970. Creation of party walls subject to reciprocal easements.

970. Creation of party walls subject to reciprocal easements.

Where the circumstances in which the wall was built and the amount of land contributed by each adjoining owner were unknown, it was presumed under the common law that the wall belonged to the owners of the adjoining properties as tenants in common[1]. The common user by adjoining owners of a party wall separating their properties is prima facie evidence that the wall and the land on which it stands would under the former law have belonged equally to them as tenants in common[2]. Moreover, before 1926, a conveyance of one house, by the owner of two houses separated by a wall, was held to pass an undivided half of the wall and, therefore, to create a tenancy in common of the wall[3]. A declaration in a conveyance that a wall should be and remain a party wall was also held to create a tenancy in common of the wall[4]. Thus, under the former law, tenancy in common was the most usual method of holding a party wall[5].

The common law presumption still applies, but takes effect subject to the effect of the Law of Property Act 1925, which substitutes a vertical division of the wall with reciprocal easements[6]. Many party walls will now be held in this way[7] and such walls will usually constitute either party walls[8] or party fence walls[9] for the purposes of the Party Wall etc Act 1996.

Where houses have been erected in contiguity by the same owner and therefore necessarily require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support, so that the owner who sells one of the houses grants as against himself such a right, and on his own part also reserves the right, whether the houses are parted with at one time or at separate times[10]. The dividing walls accordingly become party walls at common law within either the first or third sense[11] and, in any event, they will be party walls for the purposes of the Party Wall etc Act 1996[12].

The grant of a divided half of an outside wall of a house, with the intention of making the wall a party wall between that house and an adjoining house to be built by the grantee, will be deemed to create in favour of the grantor and the grantee such easements as may be necessary to carry out what was the common intention of the parties with regard to the use of the wall, the nature of the easements varying with the particular circumstances of each case[13].

1 *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404; *Cubitt v Porter* (1828) 8 B & C 257.

2 *Cubitt v Porter* (1828) 8 B & C 257; *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404 at 408; *Jones v Read* (1876) IR 10 CL 315; *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 at 71.

3 *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404.

4 *Watson v Gray* (1880) 14 ChD 192.

5 *Watson v Gray* (1880) 14 ChD 192.

6 See the Law of Property Act 1925 s 38(1); and para 962 ante. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

7 It was assumed that the party wall was held in this way in *Rees v Skerrett* [2001] EWCA Civ 760 at [5], [15], [2001] 1 WLR 1541 at [5], [15], per Lloyd J. As to the effect of such holdings see para 976 post.

8 For the statutory meaning of 'party wall' see para 963 ante.

9 For the meaning of 'party fence wall' see para 963 ante.

10 *Richards v Rose* (1853) 9 Exch 218. Cf *Wheeldon v Burrows* (1879) 12 ChD 31, CA, disapproving *Pyer v Carter* (1857) 1 H & N 916. Contrast *Scales v Vandeleur* (1913) 48 ILT 36; affd (1914) 48 ILT 38, CA (landlord not liable for damage to tenant's premises caused by dilapidated condition of adjoining premises belonging to, but not in the occupation of, the landlord).

11 As to party walls in the first and third sense see para 962 heads (1), (3) ante.

12 See para 963 ante.

13 *Jones v Pritchard* [1908] 1 Ch 630 at 635. See also *Richards v Rose* (1853) 9 Exch 218; *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476, PC.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(2) CREATION OF PARTY WALLS/971. Effect of a party wall declaration.

971. Effect of a party wall declaration.

A declaration in a deed that a wall is a party wall normally creates a party wall at common law in the third sense[1]. Whether or not such a declaration creates an express obligation or covenant to repair, contrary to the general rule[2], will depend upon the true construction of the declaration. Any such express repairing obligation, imposing positive burdens, will not bind successors in title[3] and the common law principle of mutual benefit and burden[4] is unlikely to apply to party walls[5].

An express declaration that a wall is a party wall brings it within the provisions of the Party Wall etc Act 1996[6], and the common law rights and obligations will then be supplanted[7].

1 See the Law of Property Act 1925 s 38(1); and *Watson v Gray* (1880) 14 ChD 192. As to party walls in the third sense see para 962 head (3) ante.

2 See *Leigh v Dickeson* (1884) 15 QBD 60, CA; and para 978 post.

3 See *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371.

4 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 64.

5 See *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL (where it was held that reciprocal benefits and burdens of support did not make an independent obligation to repair an overhanging roof enforceable). See also EASEMENTS AND PROFITS A PRENDRE.

6 Ie unless, exceptionally, a party wall in single ownership was expressly created: see para 968 ante. For the statutory meaning of 'party wall' see para 963 ante. As to the rights and duties arising by virtue of the Party Wall etc Act 1996 see para 979 et seq post.

7 See para 961 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/972. In general.

(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW

972. In general.

The common law rules relating to party walls and rights of support now only apply in those situations not covered by the Party Wall etc Act 1996 or where the procedures of the Act are not followed[1]. Under the common law rules, the rights and duties inter se of adjoining owners in respect of party walls depend upon the category into which the party wall falls[2] and upon the circumstances of the case.

1 See para 961 ante. As to statutory rights, duties and procedures in relation to party walls see para 979 et seq post.

2 As to the categories see *Watson v Gray* (1880) 14 ChD 192 at 194 per Fry J; and para 962 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/973. Party walls in single ownership.

973. Party walls in single ownership.

A party wall in the first sense[1] is a wall which belongs entirely to one of the owners of adjoining lands but is subject to an easement or right in the other to have it maintained as a dividing wall between the two properties[2]. This description of the easement or right[3] is somewhat misleading, as it does not mean that the owner of the wall is required to take any positive steps, for example to keep the wall in repair. Apart from any special local custom or express contract, the owner of the wall is subject to no liability if, by reason of natural decay or other circumstances beyond his control, the wall falls down or otherwise passes into such a condition that the easement or right over it becomes difficult or impossible to exercise; he is liable only for positive acts producing these consequences[4]. Nevertheless, the adjoining owner is entitled to repair the wall so far as is reasonably necessary for the enjoyment of his easement, and to enter on his neighbour's land for that purpose[5], but he is not entitled to reimbursement of any part of his expense[6].

The mere fact that a wall on the land of one owner acts to divide the property from land vested in another does not make it a party wall or give the adjoining owner rights over it, but even if the adjoining owner has no rights over the wall, he may nevertheless abate any nuisance caused by lack of repair and recover the cost of dismantling the wall, although the cost of rebuilding the wall is not recoverable[7].

A wall is only a party wall to the extent that there is a right to use it as such[8]. Subject to the easement of the adjoining owner, the owner of the wall may deal with it as he pleases[9] and, provided he uses it for the contemplated objects and without negligence or want of due care, he is not responsible for any nuisance or inconvenience thereby occasioned[10].

As far as the owner of the wall is concerned, he will, in the absence of agreement, have a right of natural support only[11]. The taking away of the soil giving natural support is not itself wrongful but becomes actionable when actual damage is sustained[12] and the servient owner who authorises the acts is liable for work done by an independent contractor[13]. An easement of support for the wall itself can be acquired by prescription[14]. Once acquired, such an easement is not extinguished unless the mode of use of the support is altered or increased so as to impose a substantial additional restriction upon the adjoining servient owner[15].

1 As to party walls in the first sense see para 962 head (1) ante.

2 This is the only type of party wall at common law which may not be a party wall or party fence wall for the purposes of the Party Wall etc Act 1996; however, if the wall, notwithstanding being in single ownership, separates buildings belonging to different owners, then it will be a party wall for the purposes of the Act: see para 963 ante. For the statutory meaning of 'party wall' and for the meaning of 'party fence wall' see para 963 ante. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

3 The description derives from *Watson v Gray* (1880) 14 ChD 192 at 194.

4 See *Jones v Pritchard* [1908] 1 Ch 630 at 637, discussing *Taylor v Whitehead* (1781) 2 Doug KB 745; *Pomfret v Ricroft* (1669) 1 Wms Saund 321; *Sack v Jones* [1925] Ch 235 at 242.

5 *Jones v Pritchard* [1908] 1 Ch 630 at 638; *Bond v Norman, Bond v Nottingham Corpn* [1939] Ch 847, [1939] 3 All ER 669 (affd [1940] Ch 429, [1940] 2 All ER 12, CA). If the party wall separates buildings belonging to two different owners, the procedures of the Party Wall etc Act 1996 (see paras 965-967 ante, 979 et seq post) would now have to be followed: see para 961 ante.

6 *Stockport and Hyde Division of Macclesfield Hundred Highway Board v Grant* (1882) 51 LJQB 357; *Leigh v Dickeson* (1884) 15 QBD 60, CA. Cf *Co-operative Wholesale Society Ltd v British Railways Board* (1995) Times, 20 December, CA (cost of demolition recovered).

7 *Co-operative Wholesale Society Ltd v British Railways Board* (1995) Times, 20 December, CA.

8 *Weston v Arnold* (1873) 8 Ch App 1084 at 1090; *Drury v Army and Navy Auxiliary Co-operative Supply Ltd* [1896] 2 QB 271, DC; *Newton v Huggins & Co Ltd* (1906) 50 Sol Jo 617; *London, Gloucestershire and North Hants Dairy Co v Morley and Lanceley* [1911] 2 KB 257, DC.

9 Ie except where the provisions of the Party Wall etc Act 1996 provide for restrictions on the freedom of a building owner: see paras 961, 965-967 ante, 979 et seq post.

10 *Jones v Pritchard* [1908] 1 Ch 630 at 636. The consequence at common law was that if a house was demolished by one owner, thereby removing a wall on a boundary which was wholly owned by such owner, the adjoining owner who had no right of support had no claim; the pulling-down owner only had to be careful to interfere as little as possible with the adjoining structures but was not required to shore them up or take active steps for their protection: *Southwark and Vauxhall Water Co v Wandsworth District Board of Works* [1898] 2 Ch 603 at 612, CA. If, as may be more usual, there was an easement of support, the result could be different: *Bradburn v Lindsay* [1983] 2 All ER 408. See also *Brace v South East Regional Housing Association Ltd* (1984) 270 EG 1286; *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541. Now, however, any wall on a boundary which separates buildings belonging to different owners will be subject to the provisions of the Party Wall etc Act 1996: see paras 961, 965-967 ante, 979 et seq post.

11 *Dalton v Angus & Co* (1881) 6 App Cas 740, HL. See also *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA (a landowner owes a measured duty of care to a neighbour in respect of hazards which threaten the natural support of the buildings of the neighbouring landowner).

12 *Backhouse v Bonomi* (1861) 9 HL Cas 503. No action will lie for the cost of work to avert future damage: *Midland Bank plc v Bardgrove Property Services Ltd* [1991] 2 EGLR 283. See also *Benzie v Happy Eater Ltd* [1990] EGCS 76.

13 *Bower v Peate* (1876) 1 QBD 321.

14 See eg *Ray v Fairway Motors (Barnstaple) Ltd* (1968) 20 P & CR 261, CA. As to easements acquired by prescription see EASEMENTS AND PROFITS A PRENDRE.

15 *Luttrel's Case* (1601) 4 Co Rep 86a; *Ray v Fairway Motors (Barnstaple) Ltd* (1968) 20 P & CR 261, CA. See EASEMENTS AND PROFITS A PRENDRE.

974. Party walls divided vertically.

In the rare case of a party wall in the second sense[1] (that is, a wall divided vertically into two halves, each separately owned, neither owner having any easement[2] over the other's half of the wall), neither owner is entitled at common law to support from the other. The right at common law for either owner to pull down that portion of the wall standing on his own land, even if sufficient support may not be left for the portion of the wall which belongs to his neighbour[3], provided that the work is done reasonably and without negligence[4], is now superseded by the statutory code in the Party Wall etc Act 1996[5]. Nevertheless, an adjoining owner may recover damages from his neighbour if his property is damaged as a result of his neighbour's negligence or nuisance, for example from the collapse of a building on his neighbour's land known to be in a dilapidated or ruinous state, or from the negligent conduct of building operations on his neighbour's land[6]. The common law rule that if there is no negligence a person who excavates close to his boundary, and in so doing shakes the foundations of his neighbour's wall so that the wall falls down, is not liable for such injury in the absence of proof that he is under some duty to support the wall[7] is also now superseded by the statutory code[8].

An easement of support for one half of the wall by the other may be acquired by prescription, or by grant, express, implied or presumed[9].

In the absence of an easement of support for the wall, the owner of the wall will only have an easement of support for the land in its natural state[10]; to succeed in an action for interference with such an easement, the owner of the wall must prove that, in the absence of the wall, the excavations of the adjoining owner would have resulted in a substantial collapse of the natural soil so as to found a cause of action by itself. If such movement of soil can be shown, then consequent damage to the wall or buildings can be recovered as consequent to the infringement of the natural right[11].

1 As to party walls in the second sense see para 962 head (2) ante.

2 As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

3 *Wigford v Gill* (1591) Cro Eliz 269; *Wiltshire v Sidford* (1827) 1 Man & Ry KB 404 at 408; *Peyton v London Corpn* (1829) 9 B & C 725; *Colebeck v Girdlers Co* (1876) 1 QBD 234 (lessee who had covenanted to keep property in repair could not perform the covenant as a result of the inadequate support of a party wall owned by the lessor; no implied covenant of support for the lessee's property); *Mayfair Property Co v Johnston* [1894] 1 Ch 508. This inconvenient result of this type of party wall was the reason for presuming, where possible, a tenancy in common: see *Cubitt v Porter* (1828) 8 B & C 257. Where there would formerly have been a tenancy in common, the wall is now held in divided halves, each being subject to certain rights in favour of the other: see paras 962 ante, 976 post.

4 *Kempston v Butler* (1861) 12 ICLR 516. Under the Building Act 1984, the local authority may require the demolisher to make weatherproof any wall laid bare: see ss 80, 81(1), 82(1)(b) (ss 80, 81(1) as amended); and BUILDING vol 4(2) (2002 Reissue) paras 400-401. See also *Chadwick v Trower* (1839) 6 Bing NC 1; *Kempston v Butler* (1861) 12 ICLR 516; *Peyton v London Corpn* (1829) 9 B & C 725. As to the effect of a demolition order under what is now the Housing Act 1985 s 265 (as substituted) see *Bond v Norman, Bond v Nottingham Corpn* [1939] Ch 847, [1939] 3 All ER 669 (affd [1940] Ch 429, [1940] 2 All ER 12, CA); and HOUSING vol 22 (2006 Reissue) para 415.

5 See paras 961, 965-967 ante, 979 et seq post.

6 *Walters v Pfeil* (1829) Mood & M 362; *Dodd v Holme* (1834) 1 Ad & El 493; *Chauntler v Robinson* (1849) 4 Exch 163; *Todd v Flight* (1860) 9 CBNS 377 (distinguished in *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA); *St Anne's Well Brewery Co v Roberts* (1928) 140 LT 1, CA. See also *Bradburn v Lindsay* [1983] 2 All ER 408; *Brace v South East Regional Housing Association Ltd* (1984) 270 EG 1286; *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541. See further para 977 post; and NEGLIGENCE vol 78 (2010) PARA 39; NUISANCE vol 78 (2010) PARA 116 et seq.

7 *Gayford v Nicholls* (1854) 9 Exch 702; *Wyatt v Harrison* (1832) 3 B & Ad 871; *Murchie v Black* (1865) 19 CBNS 190; *Smith v Thackerah* (1866) LR 1 CP 564. See also the comments on the latter case in *A-G v Conduit Colliery Co* [1895] 1 QB 301 at 308.

8 See paras 961 ante, 982 post.

9 Such an easement converts the wall into a party wall in the third sense: see para 962 head (3) ante. As to the creation of easements see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 46 et seq. As to rights of support see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 180 et seq. As to subsidence caused by mining MINES, MINERALS AND QUARRIES vol 31 (Reissue) para 185 et seq.

10 *Dalton v Angus & Co* (1881) 6 App Cas 740, HL.

11 *Ray v Fairway Motors (Barnstaple) Ltd* (1968) 20 P & CR 261 at 268, CA, per Willmer LJ, and at 271 per Russell LJ. Only movement of soil below the level of the wall foot is relevant for this purpose.

UPDATE

974 Party walls divided vertically

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/975. Party walls subject to reciprocal easements.

975. Party walls subject to reciprocal easements.

In the common case of a party wall in the third sense[1], that is to say, a wall divided vertically into halves subject to cross-easements, the whole wall is subject to such reciprocal rights as may be necessary to carry out the common intention of the parties as to the user of the wall, the nature of the rights varying in each case but usually involving a right of support[2]. Such easements are not affected directly by the Party Wall etc Act 1996, since nothing in that Act authorises any interference with an easement of light or other easements in or relating to a party wall[3]. Either party may use the wall for the contemplated purposes, and provided this is done without negligence there will be no liability for any nuisance or inconvenience which arises[4].

Where the cross-easements include an easement of support and one owner acts in a way so as to interfere with or remove that support[5], then, in the absence of provision of equally efficient alternative support, the owner who has lost the support may protect it from interference by an action for nuisance[6] or for disturbance of the easement of support[7]. The cross-easements are binding on a local authority which demolishes the servient property under a demolition order[8], so that it must provide equivalent alternative support[9]. There is no right of support between buildings which do not adjoin each other; thus the demolition of the next-but-one house in a terrace gives no cause of action for deprivation of support[10].

As in the case of a wall belonging entirely to one owner but subject to an easement of support[11] (which is really the position here if each divided half of the wall is considered individually), the right to have the wall maintained does not mean that either party is normally required to take any positive steps, for example to keep the wall in repair[12]. However, the removal of a building adjoining one half of a party wall in such a way that the wall is exposed to the elements does impose a duty to take reasonable steps to provide weatherproofing for the dividing wall[13]. The common law position was that each party was entitled, at his own expense[14], to repair the

other's half of the wall, as well as his own, so far as reasonably necessary for the enjoyment of his easements[15], but this limited entitlement is now superseded by the more extensive statutory rights available[16]. The existence of a right in one owner to enter to repair the party wall and abate any nuisance[17] does not relieve the other defaulting owner from liability for nuisance[18].

1 As to party walls in the third sense see para 962 head (3) ante.

2 See *Jones v Pritchard* [1908] 1 Ch 630. As to easements generally see EASEMENTS AND PROFITS A PRENDRE. As to rights of support see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 180 et seq.

3 Party Wall etc Act 1996 s 9(a). However, works authorised by virtue of the machinery of the Act may well mean a temporary interference is inevitable.

4 *Jones v Read* (1876) IR 10 CL 315; *Jones v Pritchard* [1908] 1 Ch 630 at 636.

5 Interference or removal of support after properly invoking the procedures of the Party Wall etc Act 1996 is not actionable but the adjoining owner will instead have the benefit and protection of the provisions of that Act: cf *Selby v Whitbread & Co* [1917] 1 KB 736; and see paras 961, 965-967 ante, 979 et seq post. The case cited supra was decided in relation to earlier similar legislation (see para 961 ante).

6 *Bradburn v Lindsay* [1983] 2 All ER 408 (demolition of one of pair of semi-detached houses); *Brace v South East Regional Housing Association Ltd* (1984) 270 EG 1286 (subsidence caused by drying out of clay soil after demolition of adjoining terraced property). As to actions for nuisance see para 977 post; and NUISANCE vol 78 (2010) PARAS 175 et seq, 187 et seq.

7 *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541 (damages, awarded for breach of an easement of support after the demolition of an adjoining property and exposure of a previously internal party wall, included a sum for damage caused by the wind).

8 Ie an order under the Housing Act 1985 s 265 (as substituted) (or a clearance order under earlier legislation): see HOUSING vol 22 (2006 Reissue) para 415.

9 *Bond v Norman, Bond v Nottingham Corpn* [1939] Ch 847, [1939] 3 All ER 669; affd [1940] Ch 429, [1940] 2 All ER 12, CA.

10 *Solomon v Vintners' Co* (1859) 4 H & N 585.

11 See para 973 ante.

12 *Bond v Nottingham Corpn* [1940] Ch 429 at 438-439, [1940] 2 All ER 12 at 18, CA, per Sir Wilfrid Greene MR; *Jones v Pritchard* [1908] 1 Ch 630; *Sack v Jones* [1925] Ch 235.

13 *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541, applying *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA; *Bradburn v Lindsay* [1983] 2 All ER 408. See also note 7 supra; and para 977 post.

14 *Stockport and Hyde Division of Macclesfield Hundred Highway Board v Grant* (1882) 51 LJQB 357; *Leigh v Dickeson* (1884) 15 QBD 60, CA.

15 *Jones v Pritchard* [1908] 1 Ch 630 at 638.

16 See paras 961, 965-967 ante, 979 et seq post.

17 As to abatement of a nuisance see NUISANCE vol 78 (2010) PARA 214 et seq.

18 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA; *Bradburn v Lindsay* [1983] 2 All ER 408. See also para 977 post; and NUISANCE vol 78 (2010) PARA 181 et seq.

UPDATE

975 Party walls subject to reciprocal easements

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/976. Party walls subject to the Law of Property Act 1925.

976. Party walls subject to the Law of Property Act 1925.

Where a party wall was held in common prior to 1926 each of the tenants in common was entitled to the use of, that is support from, the wall, with mutual rights to prevent its destruction. However, a tenancy in common of land can no longer exist as a legal estate[1]. The Law of Property Act 1925[2] now gives to the owner of each part such rights to support and user[3] over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if there were a valid tenancy in common[4]. However, the Act in one respect at least reduced the owner's rights, for in an action for damages against a third party the owner of one half of a party wall can only recover for the damage to that half of the wall which is vested in him[5].

A person interested in a party structure affected by the Law of Property Act 1925 may apply to the court for a declaration of the rights and interests of those interested, and the court may make such order as it thinks fit[6].

The common law rights in such party walls, although still preserved by the Law of Property Act 1925, will be superseded by the statutory regime of the Party Wall etc Act 1996 where that Act applies[7]. The rule that one tenant in common could not maintain trespass against the other for an injury done to the wall, unless there had been a complete ouster, or some destruction of the common property[8] may continue to have some limited relevance but the principles relating to demolition and underpinning are not now available[9].

1 See the Law of Property Act 1925 ss 1(6), 34(2) (as amended); para 962 ante; and REAL PROPERTY vol 39(2) (Reissue) para 207.

2 See ibid ss 38(1), 39(5), Sch 1 Pt V para 1; para 962 ante; and REAL PROPERTY vol 39(2) (Reissue) para 62.

3 See *Upjohn v Seymour Estates Ltd* [1938] 1 All ER 614 (right to support of a party wall included right to protection from exposure to the elements that withdrawal of such support entailed). In *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA, the existence of an easement of shelter or protection from the weather was denied, although this case did not relate to a party wall but to an external wall built to abut the external wall of an adjoining property. See also *Bradburn v Lindsay* [1983] 2 All ER 408. As to easements generally see EASEMENTS AND PROFITS A PRENDRE. As to rights of support see *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 180 et seq.

4 The effect of this appears to be the assimilation of this obsolete category of party wall with the third type of party wall at common law: see para 962 head (3) ante.

5 *Apostal v Simons* [1936] 1 All ER 207, CA. As regards the other half of the wall, which is the property of the adjoining owner, any remedy for interference with rights of support must be against that adjoining owner. As to actions for damages see para 977 post; and DAMAGES.

6 See the Law of Property Act 1925 ss 38(2), 39 (as amended), Sch 1 Pt V para 3; and REAL PROPERTY vol 39(2) (Reissue) para 63.

7 See paras 961, 965-967 ante, 979 et seq post.

8 See *Murly v M'Dermott* (1838) 8 Ad & El 138; *Voyce v Voyce* (1820) Gow 201 (hedge grubbed up); *Murray v Hall* (1849) 7 CB 441 (actual expulsion); *Jones v Read* (1876) IR 10 CL 315 (taking down wall without intention

of rebuilding); *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 at 72; *Watson v Gray* (1880) 14 ChD 192; *Stedman v Smith* (1857) 8 E & B 1. See also *Noye v Reed* (1827) 1 Man & Ry KB 63; *Jacobs v Seward* (1872) LR 5 HL 464. See also *Firmstone v Wheeley* (1844) 2 Dow & L 203 (where it was held that if a wall was knocked down, the owner might maintain an action for trespass; but he could not, by omitting to rebuild it, hold the defendant responsible for any consequential damage).

9 Under the common law, it was held that the demolition of the whole wall for the purpose of erecting a better one as soon as possible was not such a destruction as would enable one tenant in common to maintain an action for trespass against the other*: Cubitt v Porter* (1828) 8 B & C 257; *Jones v Read* (1876) IR 10 CL 315; *Colebeck v Girdlers Co* (1876) 1 QBD 234 at 243. Contrast *Stedman v Smith* (1857) 8 E & B 1 (one tenant in common after pulling down a building on his side of the wall increased the height of the wall and built a house with the roof occupying the entire width of the top, and also inserted a stone with an inscription stating that the wall was his; held sufficient ouster) with *Watson v Gray* (1880) 14 ChD 192 (one tenant in common excluded the other from using the party wall by placing an obstruction on the wall; the only remedy of the other was to remove the obstruction). The demolishing owner had to exercise reasonable skill and care, and carry out the work without delay: *Pfluger v Hocken* (1858) 1 F & F 142; *Hughes v Percival* (1883) 8 App Cas 443, HL; *Jolliffe v Woodhouse* (1894) 10 TLR 553, CA; *Cribb v Kynoch Ltd* [1907] 2 KB 548 at 559, DC. See also *Newton v Huggins & Co Ltd* (1906) 50 Sol Jo 617. Neither owner could underpin the wall unless it could be done without injury to the other's property: *Bradbee v Christ's Hospital* (1842) 4 Man & G 714 at 761; *Standard Bank of British South America v Stokes* (1878) 9 ChD 68. See also *Mayfair Property Co v Johnston* [1894] 1 Ch 508.

However, these common law rights are no longer available and the building owner has the rights given by the Party Wall etc Act 1996 and no others: cf *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 at 73-74; *Lewis and Solome v Charing Cross, Euston and Hampstead Rly Co* [1906] 1 Ch 508 at 516-517; and see paras 961, 965-967 ante, 979 et seq post. The last two cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/977. Action for nuisance.

977. Action for nuisance.

Most, but not all[1], party walls exist with an easement of support[2]; but such an easement does not normally impose at common law a direct positive obligation to repair[3]. However, if neglect or failure to act gives rise to an actionable nuisance[4], then an obligation to repair may arise indirectly as a consequence. In the absence of such repair or maintenance work, an adjoining owner who suffers from the disrepair may recover damages to cover the cost of remedial works to the party wall to abate the nuisance[5]. Such damages can also include the cost of finishing a party wall now exposed to the elements to a reasonable standard of weatherproofing and appearance[6].

Where the provisions of the Party Wall etc Act 1996 apply, they supersede common law remedies in relation to rights of support[7].

1 Eg party walls at common law in the second sense: see para 962 head (2) ante.

2 As to easements generally see EASEMENTS AND PROFITS A PRENDRE. Nothing in the Party Wall etc Act 1996 authorises any interference with any easement in or relating to a party wall: see s 9(a); and para 975 ante.

3 *Jones v Pritchard* [1908] 1 Ch 630; *Sack v Jones* [1925] Ch 235. See also para 975 ante. The Party Wall etc Act 1996 provides extensive rights to repair (although not an obligation to repair): see para 980 post.

4 See further NUISANCE vol 78 (2010) PARA 117.

5 *Bradburn v Lindsay* [1983] 2 All ER 408 (neglect and dilapidation of one of a pair of semi-detached houses resulted in dry rot in the party wall and demolition by the local authority of the derelict house, which was in a ruinous condition, thus leaving the party wall largely unsupported; damages, both to cover cost of eradicating the dry rot and erection of supporting buttresses, were recovered on the basis that the defaulting owner owed a duty to take reasonable steps to abate the nuisance, which could have been reasonably foreseen); *Brace v South East Regional Housing Association Ltd* (1984) 270 EG 1286 (demolition of end of terrace property, converting a party wall into a flank wall, caused shrinkage and subsidence; notwithstanding a party wall

agreement, damages for the nuisance caused by the interference with the right of support were recovered); *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541 (demolition of end of terrace property, converting a party wall into a flank wall, resulted in damage from wind suction; the protection afforded by the right of support extended to the effect of such weathering and damages were recovered not only for withdrawal of support but also for breach of the duty to weatherproof the wall after demolition). Damages are not recoverable for the cost of works to prevent anticipated damage: *Midland Bank plc v Bardgrove Property Services Ltd* [1992] 2 EGLR 168, CA. See generally NUISANCE vol 78 (2010) para 101 et seq. As to abatement of a nuisance see NUISANCE vol 78 (2010) PARA 214 et seq. As to damages generally see DAMAGES.

6 *Bradburn v Lindsay* [1983] 2 All ER 408 at 414, applying *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA; *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541. This is notwithstanding the decision in *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA, in a case where there was no easement of support or a party wall, that there is no separate easement of protection from the weather. Indeed, the withdrawal of support where an easement of support exists may impose a duty to take reasonable steps to weatherproof a dividing wall once it is exposed to the elements as a result of the demolition: *Rees v Skerrett* supra at [31] per Lloyd J, applying *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA.

7 See paras 961, 965-967 ante, 979 et seq post. See also *Selby v Whitbread & Co* [1917] 1 KB 736 (where it was held that the statutory right of protection superseded the common law rights of support and an action for damages for the withdrawal of support at common law could not be maintained). This case was decided in relation to earlier similar legislation (see para 961 ante).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(3) RIGHTS AND DUTIES OF ADJOINING OWNERS AT COMMON LAW/978. Recovery of the expense of repairing or building the wall at common law.

978. Recovery of the expense of repairing or building the wall at common law.

In the absence of an actionable nuisance[1], there was at common law no general right of contribution between adjoining owners to the expense of building, maintaining or repairing a party wall[2]. A right of contribution could only arise under express contract[3], or a contract implied from common user[4] or other circumstances[5], or a local custom[6].

Where the provisions of the Party Wall etc Act 1996 regulating the apportionment of the burden of such expenses[7] apply, they supersede any such limited common law rights of contribution[8].

1 See para 977 ante; and NUISANCE vol 78 (2010) PARA 117.

2 *Leigh v Dickeson* (1884) 15 QBD 60, CA (one co-owner could not compel the other co-owner to contribute). As to the meaning of 'party wall' at common law see para 962 ante.

3 *Stuart v Smith* (1816) 2 Marsh 435. As such a contract creates a positive obligation, it is not binding on the successors in title of the obligee: *Austerberry v Oldham Corpn* (1885) 29 ChD 750, CA; and see para 951 ante.

4 *Christie v Mitchison* (1877) 36 LT 621.

5 *Irving v Turnbull* [1900] 2 QB 129, DC. See also *Thacker v Wilson* (1835) 3 Ad & El 142.

6 *Robinson v Thompson* (1890) 89 LT Jo 137, DC.

7 See para 988 post.

8 See para 961 ante.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/979. In general.

(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE

979. In general.

The Party Wall etc Act 1996 largely replaces the common law relating to party walls and rights of support[1]. The common law rules now only apply in those situations not covered by the Act or where the procedures of the Act are not followed[2].

1 See para 961 ante. As to common law rights and duties in relation to party walls see para 972 et seq ante.

2 See para 961 ante. As to statutory rights, duties and procedures in relation to party walls see paras 965-967 ante, 980 et seq post.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/980. Rights to repair or do works affecting a party wall.

980. Rights to repair or do works affecting a party wall.

Where lands of different owners[1] adjoin and at the line of junction[2] the said lands are built on or a boundary wall, being a party fence wall[3] or the external wall[4] of a building, has been erected, a building owner[5] has the following rights[6]:

5 (1) to underpin, thicken or raise a party structure[7], a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall[8];

6 (2) to make good, repair, or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect[9] or want of repair of the structure or wall[10];

7 (3) to demolish a partition which separates buildings belonging to different owners but does not conform with statutory requirements and to build instead a party wall which does so conform[11];

8 (4) in the case of buildings connected by arches or structures over public ways or over passages belonging to other persons, to demolish the whole or part of such buildings, arches or structures which do not conform with statutory requirements and to rebuild them so that they do so conform[12];

9 (5) to demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building owner and to rebuild it of sufficient strength or height for those purposes (including rebuilding to a lesser height or thickness where the rebuilt structure is of sufficient strength and height for the purposes of any adjoining owner)[13];

10 (6) to cut into a party structure for any purpose (which may be or include the purpose of inserting a damp proof course)[14];

11 (7) to cut away from a party wall, party fence wall, external wall or boundary wall any footing or any projecting chimney breast, jamb or flue, or other projection on or over the land of the building owner in order to erect, raise or underpin any such wall or for any other purpose[15];

12 (8) to cut away or demolish parts of any wall or building of an adjoining owner overhanging the land of the building owner or overhanging a party wall, to the extent that it is necessary to cut away or demolish the parts to enable a vertical wall to be erected or raised against the wall or building of the adjoining owner[16];

13 (9) to cut into the wall of an adjoining owner's building in order to insert a flashing or other weather-proofing of a wall erected against that wall[17];

14 (10) to execute any other necessary works incidental to the connection of a party structure with the premises adjoining it[18];

15 (11) to raise a party fence wall, or to raise such a wall for use as a party wall, and to demolish a party fence wall and rebuild it as a party fence wall or as a party wall[19];

16 (12) to reduce, or to demolish and rebuild, a party wall or party fence wall to: (a) a height of not less than two metres where the wall is not used by an adjoining owner to any greater extent than a boundary wall; or (b) a height currently enclosed upon by the building of an adjoining owner[20];

17 (13) to expose a party wall or party structure hitherto enclosed subject to providing adequate weathering[21].

1 For the meaning of 'owner' see para 965 note 2 ante.

2 As to the meaning of 'line of junction' see para 965 note 3 ante.

3 For the meaning of 'party fence wall' see para 963 ante.

4 As to the meaning of 'external wall' see para 964 note 4 ante.

5 For the meaning of 'building owner' see para 966 note 1 ante.

6 Party Wall etc Act 1996 s 2(1). The rights are exercisable either with consent or by serving a party structure notice and observing the statutory procedure: see para 981 post. These rights replace any which existed at common law: see *Standard Bank of British South America v Stokes* (1878) 9 ChD 68 at 73-74; *Lewis and Solome v Charing Cross, Euston and Hampstead Rly Co* [1906] 1 Ch 508 at 516-517; and see para 961 ante. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

7 For the meaning of 'party structure' see para 963 ante.

8 Party Wall etc Act 1996 s 2(2)(a). Where such work is not necessary on account of defect or want of repair of the structure or wall concerned, the right is exercisable: (1) subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations; and (2) where the work is to a party structure or external wall, subject to carrying any relevant flues and chimney stacks up to such a height and in such materials as may be agreed between the building owner and the adjoining owner concerned or, in the event of dispute, determined in accordance with s 10 (see paras 985-987 post): s 2(3)(a), (b). For these purposes, 'relevant flues and chimney stacks' are those which belong to an adjoining owner and either form part of or rest on or against the party structure or external wall: s 2(3). For the meaning of 'adjoining owner' see para 966 note 5 ante.

Where work is carried out in exercise of the right mentioned in s 2(2)(a) (see head (1) in the text), and the work is necessary on account of defect or want of repair of the structure or wall concerned, the expenses must be defrayed by the building owner and the adjoining owner in such proportion as has regard to: (a) the use which the owners respectively make or may make of the structure or wall concerned; and (b) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned: s 11(4).

9 In considering whether a party structure is defective, the proper course is to consider how far it is effective for the purpose for which it is used, or intended to be used; the right conferred is confined to making good the party structure so that it becomes effective in those respects in which it is defective: see *Barry v Minturn* [1913] AC 584 at 589, HL (dampness in a wall is not a defect unless its existence renders the wall less effective for the purposes for which it is used or intended to be used). This case was decided in relation to earlier similar legislation (see para 961 ante).

10 Party Wall etc Act 1996 s 2(2)(b). Where work is carried out in exercise of the right mentioned in s 2(2)(b), the expenses must be defrayed by the building owner and the adjoining owner in such proportion as has regard to: (1) the use which the owners respectively make or may make of the structure or wall concerned; and (2) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned: s 11(5).

11 Ibid s 2(2)(c). For the statutory meaning of 'party wall' see para 963 ante.

12 Ibid s 2(2)(d). A building or structure which was erected before 18 July 1996 (ie the day on which the Party Wall etc Act 1996 was passed) is deemed to conform with statutory requirements if it conforms with the statutes regulating buildings or structures on the date on which it was erected: s 2(8).

13 Ibid s 2(2)(e). The Party Wall etc Act 1996 provides an express power to rebuild to a lesser height in order to nullify the decision in *Gyle-Thompson v Wall Street Properties Ltd* [1974] 1 All ER 295, [1974] 1 WLR 123 (surveyor's award set aside as the London Buildings Acts gave a building owner no power to rebuild to a reduced height).

This right is exercisable subject to: (1) making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations; and (2) carrying any relevant flues and chimney stacks up to such a height and in such materials as may be agreed between the building owner and the adjoining owner concerned or, in the event of dispute, determined in accordance with the Party Wall etc Act 1996 s 10 (see paras 985-987 post): s 2(4)(a), (b). For these purposes, 'relevant flues and chimney stacks' are those which belong to an adjoining owner and either form part of or rest on or against the party structure: s 2(4).

Where the adjoining premises are laid open in exercise of the right mentioned in s 2(2)(e) (see head (5) in the text), a fair allowance in respect of disturbance and inconvenience must be paid by the building owner to the adjoining owner or occupier: s 11(6). See also para 983 post. For the meaning of 'adjoining occupier' see para 966 note 17 ante.

14 Ibid s 2(2)(f). Any right falling within s 2(2)(f) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations: s 2(5).

15 Ibid s 2(2)(g). Any right falling within s 2(g) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations: s 2(5).

16 Ibid s 2(2)(h). Any right falling within s 2(2)(h) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations: s 2(5).

17 Ibid s 2(2)(j). This right is exercisable subject to making good all damage occasioned by the work to the wall of the adjoining owner's building: s 2(6).

18 Ibid s 2(2)(k).

19 Ibid s 2(2)(l).

20 Ibid s 2(2)(m). This right is exercisable subject to: (1) reconstructing any parapet or replacing an existing parapet with another one; or (2) constructing a parapet where one is needed but did not exist before: s 2(7).

Where a building owner proposes to reduce the height of a party wall or party fence wall under s 2(2)(m) (see head (12) in the text), the adjoining owner may serve a counter notice under s 4 (see para 981 post) requiring the building owner to maintain the existing height of the wall: s 11(7). In such case, the adjoining owner must pay to the building owner a due proportion of the cost of the wall so far as it exceeds two metres in height, or the height currently enclosed upon by the building of the adjoining owner: s 11(7).

21 Ibid s 2(2)(n).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/981. Exercise of rights of repair.

981. Exercise of rights of repair.

The statutory rights to repair or do other works to a party wall[1] may be exercised with the consent in writing of the adjoining owners and the adjoining occupiers[2]. In other cases, before exercising any such right, a building owner[3] must serve on any adjoining owner a notice (a 'party structure notice')[4] stating the name and address of the building owner[5], the nature and particulars of the proposed work[6] and the date on which the proposed work will begin[7]. In cases where the building owner proposes to construct special foundations[8], the notice must include plans, sections and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby[9]. A party structure notice must be served at least

two months before the date on which the proposed work will begin[10]. It will cease to have effect if the work to which it relates: (1) has not begun within the period of 12 months beginning with the day on which the notice is served[11]; and (2) is not prosecuted with due diligence[12].

If an adjoining owner agrees with the works proposed in the party structure notice, he may serve a notice on the building owner indicating his consent within a period of 14 days beginning with the day on which the party structure notice was served[13]. If no such notice is served, then the adjoining owner is deemed to have dissented from the notice and a dispute is deemed to have arisen between the parties[14].

An adjoining owner may, having been served with a party structure notice, serve on the building owner a notice (a 'counter notice') setting out certain requirements in respect of the proposed works[15]. In respect of a party fence wall or party structure[16], a counter notice may require that the building owner build in or on the wall or structure to which the notice relates such chimney copings, breasts, jambs or flues, or such piers or recesses or other like works, as may reasonably be required for the convenience of the adjoining owner[17]. In respect of special foundations to which the adjoining owner consents[18], a counter notice may require that the special foundations be placed at a specified greater depth than that proposed by the building owner, or be constructed of sufficient strength to bear the load to be carried by columns of any intended building of the adjoining owner, or both[19]. In either case, a counter notice must specify the works required by the notice to be executed and must be accompanied by plans, sections and particulars of such works[20]. It must be served within the period of one month beginning with the day on which the party structure notice is served[21].

A building owner on whom a counter notice has been served must comply with the requirements of the counter notice unless the execution of the works required by the counter notice would: (a) be injurious to him; (b) cause unnecessary inconvenience to him; or (c) cause unnecessary delay in the execution of the works pursuant to the party structure notice[22]. A building owner may serve a consent notice[23], and is then able to proceed with the works in the party structure notice as modified by the requirements of the counter notice. If the building owner does not serve a notice indicating his consent to the requirements contained in the counter notice within the period of 14 days beginning with the day on which the counter notice was served, he is deemed to have dissented from the notice and a dispute is deemed to have arisen between the parties[24].

The exercise of the statutory rights does not authorise any interference with an easement of light or other easements in or relating to a party wall[25].

1 Ie under the Party Wall etc Act 1996 s 2: see para 980 ante. For the statutory meaning of 'party wall' see para 963 ante.

2 See ibid s 3(3)(a). For the meaning of 'adjoining owner' see para 966 note 5 ante; and for the meaning of 'adjoining occupier' see para 966 note 17 ante.

3 For the meaning of 'building owner' see para 966 note 1 ante. A valid notice cannot be given by someone who is not a building owner even if the person giving the notice expects shortly to enter into occupation and so qualify as a building owner: see *Spiers & Son Ltd v Troup* (1915) 84 LJKB 1986 at 1991. This case was decided in relation to earlier similar legislation (see para 961 ante).

4 Party Wall etc Act 1996 s 3(1). Nothing in s 3 requires a building owner to serve any party structure notice before complying with any notice served under any statutory provisions relating to dangerous or neglected structures: s 3(3)(b). However, this exception extends only to the work specified in the relevant statutory notice: see *Spiers & Son Ltd v Troup* (1915) 84 LJKB 1986 (where the building owner was required to take down a dangerous party wall he could recover the due proportion of the expenses incurred in pulling down the wall but, in the absence of a party structure notice, not of rebuilding it). The notice ought to be so clear and intelligible that the adjoining owner may be able to see what counter-notice he should give to the building owner: see *Hobbs Hart & Co v Grover* [1899] 1 Ch 11 at 15, CA, per Lindley MR. So a notice will be bad if the details given in the notice are vague or hypothetical: see *Spiers & Son Ltd v Troup* supra at 1991 per Scrutton J. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

5 Party Wall etc Act 1996 s 3(1)(a).

6 Ibid s 3(1)(b).

7 Ibid s 3(1)(c).

8 For the meaning of 'special foundations' see para 966 note 15 ante.

9 Party Wall etc Act 1996 s 3(1)(b).

10 Ibid s 3(2)(a).

11 It seems that this time limit does not apply where the statutory dispute procedure is being operated: see *Leadbetter v Marylebone Corpn* [1905] 1 KB 661, CA. This case was decided in relation to earlier similar legislation (see para 961 ante).

12 Party Wall etc Act 1996 s 3(2)(b).

13 See ibid s 5. The time for giving a notice is often extended by agreement: cf *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155 (counter notice). This case was decided in relation to earlier similar legislation (see para 961 ante).

14 Party Wall etc Act 1996 s 5. As to the resolution of disputes see paras 985-987 post.

15 Ibid s 4(1). A counter notice will be appropriate when the adjoining owner consents to the proposed works but wishes to secure modifications or changes to the proposals. The adjoining owner has to pay for the works required by the counter notice: see s 11(9); and para 988 post. However, where an adjoining owner wishes to do works himself, such as raising or building upon the party wall, he becomes a building owner and must give a party structure notice: see *Leadbetter v Marylebone Corpn* [1904] 2 KB 893, CA. This case was decided in relation to earlier similar legislation (see para 961 ante).

16 For the meanings of 'party fence wall' and 'party structure' see para 963 ante.

17 Party Wall etc Act 1996 s 4(1)(a).

18 Ie under ibid s 7(4): see para 983 post.

19 Ibid s 4(1)(b).

20 Ibid s 4(2)(a).

21 Ibid s 4(2)(b).

22 Ibid s 4(3).

23 See ibid s 5.

24 Ibid s 5.

25 Ibid s 9(a). See also *Crofts v Haldane* (1867) 2 LR QB 194 (where it was held that a party structure could not be raised so as to interfere with ancient rights of light). This case was decided in relation to earlier similar legislation (see para 961 ante).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/982. Restrictions on excavation and construction adjacent to boundaries.

982. Restrictions on excavation and construction adjacent to boundaries.

A building owner[1] is subject to statutory restrictions and requirements[2] when he proposes to excavate[3], or excavate for and erect a building or structure on his own land, within specified distances of a building or structure[4] of an adjoining owner[5]. For this purpose, all owners of buildings or structures within these distances are deemed to be adjoining owners[6].

The restrictions apply where:

18 (1) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner, and any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations[7] of the building or structure of the adjoining owner[8];

19 (2) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of six metres measured horizontally from any part of a building or structure of an adjoining owner, and any part of the proposed excavation, building or structure will within those six metres meet a plane drawn downwards in the direction of the excavation, building or structure of the building owner at an angle of 45 degrees to the horizontal from the line formed by the intersection of the plane of the level of the bottom of the foundations of the building or structure of the adjoining owner with the plane of the external face of the external wall of the building or structure of the adjoining owner[9].

In any case where the restrictions apply, the building owner must, at least one month before beginning to excavate, or excavate for and erect a building or structure, serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner[10]. An owner on whom such a notice has been served may serve a notice indicating his consent to it[11]. If he does not serve a consent notice within 14 days beginning with the day on which the building owner's notice was served, he is deemed to have dissented from that notice and a dispute is deemed to have arisen between the parties[12]. The building owner's notice ceases to have effect if the work to which the notice relates: (a) has not begun within the period of 12 months beginning with the day on which the notice was served[13]; and (b) is not prosecuted with due diligence[14].

The building owner may, and if required by the adjoining owner must, at his own expense underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner so far as may be necessary[15].

On completion of any work executed in pursuance of the provisions described above, the building owner must, if so requested by the adjoining owner, supply him with particulars including plans and sections of the work[16].

Nothing in the provisions described above relieves the building owner from any liability to which he would otherwise be subject for injury to any adjoining owner or any adjoining occupier[17] by reason of work executed by him[18].

1 For the meaning of 'building owner' see para 966 note 1 ante.

2 Ie by virtue of the Party Wall etc Act 1996 s 6.

3 The terms 'excavate' and 'excavation' are not defined in the Party Wall etc Act 1996 but would appear to include all operations which involve the removal of earth, soil or rocks from the ground.

4 Although 'structure' is not defined in the Party Wall etc Act 1996, an adjoining structure would appear to include a boundary wall in the sole ownership of the adjoining owner but not a party wall between the two properties since it would not be a structure of an adjoining owner. It seems that an underground pipe, cable or sewer is not a structure.

5 The precise position of the boundary or line of junction is not relevant to this issue. As to the meaning of 'line of junction' see para 965 note 3 ante. For the meaning of 'adjoining owner' see para 966 note 5 ante; and see also the text and note 5 infra.

6 See the Party Wall etc Act 1996 ss 6(4), 20. The building or structure need not, therefore, be situated on land that has a common boundary with the land of the building owner.

7 For the meaning of 'foundation' see para 966 note 15 ante.

8 Party Wall etc Act 1996 s 6(1).

9 Ibid s 6(2).

10 Ibid s 6(5). The notice must be accompanied by plans and sections showing: (1) the site and depth of any excavation the building owner proposes to make; and (2) if he proposes to erect a building or structure, its site: s 6(6). The notice must be served in accordance with s 15: see para 989 post.

11 See ibid s 6(7). The consent notice may be used to require the building owner to make any necessary underpinning or otherwise safeguard the foundations: see the text and note 15 infra.

12 Ibid s 6(7). As to the resolution of disputes see paras 985-987 post.

13 It seems that this time limit does not apply where the statutory dispute procedure is being operated: see *Leadbetter v Marylebone Corpn* [1905] 1 KB 661, CA. This case was decided in relation to earlier similar legislation (see para 961 ante).

14 Party Wall etc Act 1996 s 6(8). 'Diligence' has been said to import a need to work continuously, industriously and efficiently towards achievement of the obligation: *West Faulkner Associates (a firm) v Newham London Borough Council* (1994) 42 ConLR 144, CA (decided in the context of a JCT construction contract).

15 Party Wall etc Act 1996 s 6(3). The duty to underpin or otherwise strengthen or safeguard foundations would appear to include all parts of the adjoining building or structure where it is necessary to do so and not just those parts of it within the statutory distances.

16 Ibid s 6(9).

17 For the meaning of 'adjoining occupier' see para 966 note 17 ante.

18 Party Wall etc Act 1996 s 6(10).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/983. Obligations of a building owner exercising the statutory rights.

983. Obligations of a building owner exercising the statutory rights.

A building owner[1] must not exercise any right conferred on him by the Party Wall etc Act 1996 in such a manner or at such time as to cause unnecessary inconvenience[2] to any adjoining owner[3] or to any adjoining occupier[4]. Any works executed in pursuance of the Act must comply with statutory requirements[5]. They must be executed in accordance with such plans, sections and particulars as may be agreed between the owners or, in the event of dispute, determined in accordance with the statutory dispute resolution procedure[6].

Where a building owner in exercising any right conferred on him by the Party Wall etc Act 1996 lays open[7] any part of the adjoining land or building he must at his own expense make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier[8].

Nothing in the Party Wall etc Act 1996 authorises the building owner to place special foundations[9] on land of an adjoining owner without his previous consent in writing[10].

The building owner must compensate any adjoining owner and any adjoining occupier for any loss or damage[11] which may result to any of them by reason of any work executed in pursuance

of the Party Wall etc Act 1996[12]. Where the adjoining premises are laid open in exercise of the right to demolish a party structure[13], a fair allowance must be paid by the building owner to the adjoining owner or occupier in respect of disturbance or inconvenience[14].

Where the building owner is required to make good damage under the Party Wall etc Act 1996[15], the adjoining owner may require that the expenses of such making good be determined in accordance with the statutory dispute resolution procedure[16] and paid to him in lieu of the carrying out of work to make the damage good[17].

1 For the meaning of 'building owner' see para 966 note 1 ante.

2 The onus of justifying such inconvenience rests with the building owner: see *Barry v Minturn* [1913] AC 584 at 592, HL (a building owner could not insist on a vertical damp proof course on the adjoining owner's side of the party wall where the wall was only a garden wall on the adjoining owner's side). This case was decided in relation to earlier similar legislation (see para 961 ante).

3 For the meaning of 'adjoining owner' see para 966 note 5 ante.

4 Party Wall etc Act 1996 s 7(1). For the meaning of 'adjoining occupier' see para 966 note 17 ante. The benefit of this obligation is extended to adjoining occupiers even though they have no right to take part in the process of resolving disputes under s 10: see para 985 post.

5 Ibid s 7(5)(a). This is an obligation to comply with the statutory requirements applicable to the work proposed: see eg the Building Act 1984; the Building Regulations 2000, SI 2000/2531 (as amended); and BUILDING. See also the Health and Safety at Work etc Act 1974; and HEALTH AND SAFETY AT WORK.

6 Party Wall etc Act 1996 s 7(5)(b). No deviation may be made from those plans, sections and particulars except such as may be agreed between the owners (or surveyors acting on their behalf) or, in the event of dispute, determined in accordance with statutory dispute resolution procedure: s 7(5). As to the resolution of disputes see paras 985-987 post. For the meaning of 'surveyor' see para 985 note 4 post.

7 As well as the requirement of protection, the laying open of adjoining premises may give rise to a liability to pay a fair allowance in respect of disturbance or inconvenience: see the text and note 14 infra.

8 Party Wall etc Act 1996 s 7(3). This obligation will arise even if the adjoining owner has consented to the work or even if the work commences after an award which makes specific provision for protection.

9 For the meaning of 'special foundations' see para 966 note 15 ante.

10 Party Wall etc Act 1996 s 7(4).

11 Loss or damage would appear to cover both damage incurred while the works are being carried out and any long term damage or loss sustained as a consequence of the effect of the works on the adjoining property. It seems that it may now extend to loss or damage to trade carried on from the adjoining property, which was not covered under the London Building Acts (see *Adams v Marylebone Corpn* [1907] 2 KB 822, CA).

12 Party Wall etc Act 1996 s 7(2). See note 14 infra.

13 Ie the right granted by ibid s 2(2)(e): see para 980 head (5) ante.

14 See ibid s 11(6); and para 980 note 13 ante. This provision has its origins in the London Building Act 1894 (see para 961 ante), but the wider compensation obligation contained in the Party Wall etc Act 1996 s 7(2) (see the text and note 12 supra) has no counterpart in the earlier legislation. The duty to pay a fair allowance under s 11(6) for disturbance and inconvenience where an inadequate party structure is demolished does not now add significantly to the new more general duty to compensate under s 7(2).

15 The duty to make good may arise when many of the statutory rights are exercised: see ibid s 2; and para 980 ante.

16 See paras 985-987 post.

17 See the Party Wall etc Act 1996 s 11(8); and para 988 post.

UPDATE

983 Obligations of a building owner exercising the statutory rights

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 12--The court may take into account the coincidence between the carrying out of work and the damage to the adjoining property when drawing inferences as to causation: *Roadrunner Properties Ltd v Dean* [2003] EWCA Civ 1816, [2004] 11 EG 140.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/984. Rights of entry.

984. Rights of entry.

Rights of entry are given to a building owner[1] and surveyors[2] appointed under the Party Wall etc Act 1996 which are exercisable after due notice has been given[3]. No land or premises may be entered by any person unless the building owner serves a notice of intention to enter on the owner and the occupier of the land or premises[4]. In case of emergency, such notice of intention to enter must be given as may be reasonably practicable[5]. In any other case, the notice of intention to enter must be served in a period of not less than 14 days ending with the day of the proposed entry[6].

After service of a notice of intention to enter, a building owner, his servants, agents and workmen may during usual working hours enter and remain on any land or premises for the purpose of executing any work in pursuance of the Party Wall etc Act 1996 and may remove any furniture or fittings or take any other action necessary for that purpose[7]. If the premises are closed, the building owner, his agents and workmen may, if accompanied by a constable or other police officer, break open any fences or doors in order to enter the premises[8]. A surveyor appointed or selected to settle a dispute[9] may during usual working hours enter and remain on any land or premises for the purpose of carrying out the object for which he is appointed or selected[10].

If an occupier of land or premises refuses to permit a person to do anything which he is entitled to do with regard to the land or premises[11] and the occupier knows or has reasonable cause to believe that the person is so entitled, the occupier is guilty of an offence[12]. If a person hinders or obstructs another person in attempting to do anything which he is entitled to do with regard to land or premises[13], and knows or has reasonable cause to believe that that other person is so entitled, then he is guilty of an offence[14]. A person guilty of either of these offences is liable on summary conviction to a fine of an amount not exceeding level 3 on the standard scale[15].

1 For the meaning of 'building owner' see para 966 note 1 ante.

2 For the meaning of 'surveyor' see para 985 note 4 post.

3 Ie by virtue of the Party Wall etc Act 1996 s 8.

4 See ibid s 8(3), (6). Where access is required for a surveyor, the notice must be served by the building owner who is a party to the dispute that has arisen: see s 8(6). The notice must be served in accordance with s 15: see para 989 post.

5 See ibid s 8(3)(a), (6)(a).

6 See ibid s 8(3)(b), (4), (6)(b).

7 Ibid s 8(1).

8 Ibid s 8(2).

9 Ie under ibid s 10: see para 985 post.

10 Ibid s 8(5). The surveyor does not have statutory power to break open any fences or doors.

11 Ie under ibid s 8(1) or s 8(5): see the text and notes 7, 10 supra.

12 Ibid s 16(1).

13 Ie under ibid s 8(1) or s 8(5): see the text and notes 7, 10 supra.

14 Ibid s 16(2).

15 Ibid s 16(3). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/985. Dispute resolution procedure.

985. Dispute resolution procedure.

Where a dispute arises[1] or is deemed to have arisen[2] between a building owner and an adjoining owner in respect of any matter connected with any work to which the Party Wall etc Act 1996 relates, the dispute is resolved by operating the statutory procedure as described below[3], leading to an award by a surveyor or surveyors[4]. Either both parties must concur in the appointment of one surveyor (known as an 'agreed surveyor')[5], or each party must appoint a surveyor[6] and the two surveyors so appointed must forthwith select a third surveyor[7] (all of whom together are known as 'the three surveyors')[8]. All appointments and selections must be in writing and cannot be rescinded by either party[9].

If either party to the dispute refuses to appoint a surveyor, or neglects to appoint a surveyor for a period of ten days beginning with the day on which the other party serves a request on him, the other party may make the appointment on his behalf[10].

The proceedings for settling a dispute must begin de novo if an agreed surveyor: (1) refuses to act; (2) neglects to act for a period of ten days beginning with the day on which either party serves a request on him; (3) dies before the dispute is settled; or (4) becomes or deems himself incapable of acting[11]. If, before the dispute is settled, a surveyor appointed[12] by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority[13]. If an appointed surveyor[14] refuses to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him is as effectual as if he had been an agreed surveyor[15]. If an appointed surveyor[16] neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act ex parte in respect of the subject matter of the request

and anything so done by him is as effectual as if he had been an agreed surveyor[17]. If a third surveyor selected by the appointed surveyors[18]: (a) refuses to act; (b) neglects to act for a period of ten days beginning with the day on which either party or the surveyor appointed by either party serves a request on him; or (c) dies, or becomes or deems himself incapable of acting, before the dispute is settled, then the other two of the three surveyors must forthwith select another surveyor in his place with the same power and authority[19].

1 Disputes to be determined under the Party Wall etc Act 1996 s 10 include disputes over: building on the line of junction (see s 1(8); and paras 966-967 ante); work which involves carrying flues or chimney stacks to an increased height (see s 2(3)(b), (4)(b); and para 980 ante); any deviation from previously agreed plans (see s 7(5)(b); and para 983 supra); responsibility for expenses (see s 11(2); and para 988 post); and security for expenses (see s 12(1), (2); and para 988 post). Any other dispute between the building owner and any adjoining owner is also to be determined under the statutory procedure: cf *Selby v Whitbread & Co* [1917] 1 KB 736 at 744-745 (where it was held that the statutory procedure covered differences that were questions of fact, questions of law and mixed questions of fact and law). This case was decided in relation to earlier similar legislation (see para 961 ante). For the meaning of 'building owner' see para 966 note 1 ante; and for the meaning of 'adjoining owner' see para 966 note 5 ante.

2 Under the Party Wall etc Act 1996, a dispute is deemed to have arisen in several situations, including: where a party structure notice or a counter notice has been given and the recipient has not indicated his consent (see s 5; and para 981 ante); where an adjoining owner does not consent to a notice proposing adjacent excavation or construction (see s 6(7); and para 982 ante); and where an adjoining owner serves notice of objection to an account from the building owner (see s 13(2); and para 988 post). For the meanings of 'party structure notice' and 'counter notice' see para 981 ante.

3 Ie the procedure set out in ibid s 10.

4 'Surveyor' means any person not being a party to the matter appointed or selected under ibid s 10 to determine disputes in accordance with the procedures set out in the Party Wall etc Act 1996: s 20. There is no specific statutory requirement for the person appointed or selected to have any professional qualification or expertise as a surveyor.

As to the award determining disputed matters see para 986 post.

5 Ibid s 10(1)(a).

6 Ibid s 10(1)(b).

7 If either surveyor appointed under ibid s 10(1)(b) by a party to the dispute refuses to select a third surveyor (ie under s 10(1) or under s 10(9) (see the text and note 19 infra)) or neglects to do so for a period of ten days beginning with the day on which the other surveyor serves a request on him, then the appointing officer or, in cases where the relevant appointing officer or his employer is a party to the dispute, the Secretary of State may on the application of either surveyor select a third surveyor who has the same power and authority as if he had been selected under s 10(1) or s 10(9): s 10(8). 'Appointing officer' means a person appointed under the Party Wall etc Act 1996 by the local authority to make appointments under s 10(8): s 20.

In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 355. Functions of the Secretary of State under the Party Wall etc Act 1996, so far as exercisable in relation to Wales, have been transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1. As to the establishment, constitution and functions of the National Assembly for Wales see the Government of Wales Act 1998; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

8 Party Wall etc Act 1996 s 10(1)(b).

9 Ibid s 10(2). The appointment or selection of a surveyor is consequently irrevocable.

10 Ibid s 10(4). The power is expressly limited to failure or neglect to appoint under s 10(1)(b) and does not extend to a failure or neglect to appoint afresh under s 10(5) (see the text and note 13 infra) after a surveyor duly appointed dies or is incapable of acting.

11 Ibid s 10(3).

12 Ie under ibid s 10(1)(b): see the text and note 6 supra.

13 Ibid s 10(5).

14 Ie a surveyor appointed under ibid s 10(1)(b) by a party to the dispute (see the text and note 6 supra), or appointed under s 10(4) (see the text and note 10 supra) or s 10(5) (see the text and note 13 supra).

15 Ibid s 10(6). Refusal to act effectively in this context would appear to refer to a refusal to take any effective step towards resolving the dispute. Since such a refusal permits the other party's surveyor to make an award on his own, it may be limited to a refusal designed to frustrate the statutory process. See *Frances Holland School v Wassef* [2001] 2 EGLR 88 (county court) (where it was held that the formalities must be strictly complied with when a surveyor wishes to proceed to make an award ex parte). This case was decided in relation to earlier similar legislation (see para 961 ante).

16 Ie a surveyor appointed under the Party Wall etc Act 1996 s 10(1)(b) by a party to the dispute (see the text and note 6 supra), or appointed under s 10(4) (see the text and note 10 supra) or s 10(5) (see the text and note 13 supra).

17 Ibid s 10(7).

18 Ie under ibid s 10(1)(b): see the text and note 8 supra.

19 Ibid s 10(9).

UPDATE

985 Dispute resolution procedure

NOTE 7--As to the National Assembly for Wales and the Welsh Assembly Government, see Government of Wales Act 2006; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/986. Award determining disputed matters.

986. Award determining disputed matters.

The agreed surveyor[1] or, as the case may be, the three surveyors[2] or any two of them[3] must settle by award[4] any matter: (1) which is connected with any work to which the Party Wall etc Act 1996 relates[5]; and (2) which is in dispute between the building owner[6] and the adjoining owner[7]. Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor[8] to determine the disputed matters and he must then make the necessary award[9].

An award may determine: (a) the right to execute any work; (b) the time and manner of executing any work; and (c) any other matter arising out of or incidental to the dispute including the costs of making the award[10]. An award may impose on the building owner both an immediate obligation to execute the specified works and a continuing obligation to maintain the party wall[11]. An award may not make any interference with an easement of light or other easements in or relating to a party wall[12], nor may it prejudicially affect any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt[13]. An award may not purport to decide future disputes that have not yet arisen[14]. An award which is beyond the powers given by the Party Wall etc Act 1996 will be void, either in whole[15] or in part[16]. An award made by surveyors under the Party Wall etc Act 1996 is not an arbitration for the purposes of the Arbitration Act 1996[17].

The reasonable costs incurred in: (i) making or obtaining an award; (ii) reasonable inspections of work to which the award relates; and (iii) any other matter arising out of the dispute, must be paid by such of the parties as the surveyor or surveyors making the award determine[18].

Where the surveyors appointed by the parties make an award, the surveyors must serve it forthwith on the parties[19]. Where an award is made by the third surveyor[20] he must, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors[21]; and if it is served on their appointed surveyors, they must serve it forthwith on the parties[22].

1 For the meaning of 'agreed surveyor' see para 985 ante. For the meaning of 'surveyor' see para 985 note 4 ante.

2 For the meaning of 'the three surveyors' see para 985 ante.

3 If the two surveyors appointed by the parties can agree, they do not need to involve the third surveyor. If they cannot agree, then the third surveyor must be brought into the process.

4 See *Selby v Whitbread & Co* [1917] 1 KB 736 at 743 (where it was held that the jurisdiction of the surveyors is continuous and exclusive, permitting a number of awards). See also *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155 (where there was an award by the two surveyors appointed by the parties and a subsequent award by the third surveyor after a difference arose about consequential damage). The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

5 Party Wall etc Act 1996 s 10(10)(a).

6 For the meaning of 'building owner' see para 966 note 1 ante.

7 Party Wall etc Act 1996 s 10(10)(b). For the meaning of 'adjoining owner' see para 966 note 5 ante. If more than one adjoining owner is in dispute with the building owner, the dispute procedure must be activated separately for each such adjoining owner: see eg *Marchant v Capital & Counties plc* [1983] 2 EGLR 156, CA (where the adjoining freeholder, the occupying adjoining leaseholder and the building owner appointed surveyors). This case was decided in relation to earlier similar legislation (see para 961 ante).

8 Ie the surveyor selected under the Party Wall etc Act 1996 s 10(1)(b): see para 985 ante.

9 Ibid s 10(11). In such circumstances, the resolution of the dispute and power to make the award pass solely to the third surveyor.

10 Ibid s 10(12). See *Woodhouse v Consolidated Property Corpn Ltd* [1993] 1 EGLR 174 at 177, CA, per Glidewell LJ (since the surveyors are not authorised to determine other disputes arising between the parties, an award determining the cause of a collapse of a party wall was one made without jurisdiction); *Burlington Property Co Ltd v Odeon Theatres Ltd* [1939] 1 KB 633, [1938] 3 All ER 469, CA (award could not permit the building owner to substitute wider openings in the party wall for existing windows). The past history of a party wall is not a relevant consideration to the issue that the surveyors have to decide: see *Barry v Minturn* [1913] AC 584, HL (where it was held that the fact that a predecessor in title of the building owner had utilised a garden party wall as an outside wall of a home extension was not relevant in resolving the problem of dampness in the wall). The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

Any period appointed by the award for executing any work does not, unless otherwise agreed between the building owner and the adjoining owner, begin to run until after the expiration of the period prescribed by the Party Wall etc Act 1996 for service of the notice in respect of which the dispute arises or is deemed to have arisen: s 10(12) proviso. The minimum time limit for notices relating to building on the line of junction or adjacent excavation or construction is one month (see ss 1(2), 6(5); and paras 966, 982 ante), and for repairs and other work authorised by s 2 it is two months (see s 3(2); and para 981 ante). As to the service of notices see para 989 post.

11 See *Marchant v Capital & Counties plc* [1983] 2 EGLR 156, CA (where it was held that a continuing obligation to maintain the party wall in a weatherproof condition was within the powers of the surveyors but it was said that it was better for a party wall award to prescribe for particular works to have a certain long term result rather than to impose a continuing obligation). This case was decided in relation to earlier similar legislation (see para 961 ante).

12 Party Wall etc Act 1996 s 9(a). See also *Crofts v Haldane* (1867) 2 LR QB 194. This case was decided in relation to earlier similar legislation (see para 961 ante). As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

13 Party Wall etc Act 1996 s 9(b).

14 See *Leadbetter v Marylebone Corpn* [1904] 2 KB 893, CA (where it was held that an award which purported to give the adjoining owner the right to raise the wall at a future date was to that extent invalid). This case was decided in relation to earlier similar legislation (see para 961 ante).

15 See *Woodhouse v Consolidated Property Corpn Ltd* [1993] 1 EGLR 174, CA; *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 295, [1974] 1 WLR 123 (award invalid procedurally as the proper notices had not been served and substantively as the award purported to grant a right which was not available under the Act). The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

16 See *Selby v Whitbread & Co* [1917] 1 KB 736 at 748, CA (an award void in part may be good as to the remainder provided the part which is bad can be separated with reasonable clearness); *Leadbetter v Marylebone Corpn* [1904] 2 KB 893, CA; *Re an Arbitration between Stone and Hastie* [1903] 2 KB 463, CA; *Burlington Property Co Ltd v Odeon Theatres Ltd* [1939] 1 KB 633, [1938] 3 All ER 469, CA. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

17 See *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155. Earlier cases, however, often use the language of arbitration (see *Burlington Property Co Ltd v Odeon Theatres Ltd* [1939] 1 KB 633, [1938] 3 All ER 469, CA) or even assume the procedure of the Arbitration Acts (see ARBITRATION vol 2 (2008) PARA 1209 et seq) can apply (see *Re an Arbitration between Stone and Hastie* [1903] 2 KB 463, CA). See also *Barry v Minturn* [1913] AC 584, HL, where the surveyors were described as constituting a tribunal. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

18 Party Wall etc Act 1996 s 10(13).

19 Ibid s 10(14).

20 Ie after he assumed sole jurisdiction after being called upon to do so under ibid s 10(11): see the text and note 9 supra.

21 Ibid s 10(15)(a).

22 Ibid s 10(15)(b).

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NOTE 18--A surveyor cannot order a party to pay costs in connection with litigation that was contemplated but not in fact instigated: *Blake v Reeves* [2009] EWCA Civ 611, [2010] 1 WLR 1, [2009] All ER (D) 253 (Jun).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/987. Appeal against an award.

987. Appeal against an award.

Either of the parties to the dispute may, within the period of 14 days[1] beginning with the day on which an award[2] is served on him, appeal to the county court against the award[3]. The county court may rescind the award or modify it in such manner as the court thinks fit[4], and may make such order as to costs as the court thinks fit[5].

Apart from this right to appeal[6], the award is conclusive[7] and may not be questioned in any court[8].

1 It seems that this is a strict time limit: see *Riley Gowler v National Heart Hospital* [1969] 3 All ER 1401, CA. This case was decided in relation to earlier similar legislation (see para 961 ante).

2 As to the making of an award see para 986 ante.

3 Party Wall etc Act 1996 s 10(17).

4 Ibid s 10(17)(a). See *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155 (the court has wide powers on an appeal, if required, to rescind or to modify an award in such manner as it thinks fit, to substitute its own finding or conclusion for any finding or conclusion of the surveyors and for that purpose to receive any evidence (whether of fact or opinion) relevant to an issue raised by the appeal, including evidence which was not or could not have been available to the surveyors when the award was made). This case was decided in relation to earlier similar legislation (see para 961 ante).

5 Party Wall etc Act 1996 s 10(17)(b).

6 Exercise of the right to appeal will mean the award is not conclusive unless and until confirmed on appeal. See *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155 (where the Arbitration Acts were excluded). This case was decided in relation to earlier similar legislation (see para 961 ante).

7 An award will only be conclusive if it is valid. An invalid award (see para 986 ante) may be challenged even if the time for an appeal has passed: see *Re an Arbitration between Stone and Hastie* [1903] 2 KB 463, CA (validity could be raised when steps were taken to enforce an award which directed the making of a payment by the building owner to the adjoining occupier, which was held to be beyond the jurisdiction of the surveyors); *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 295, [1974] 1 WLR 123 (adjoining owner successfully obtained an injunction preventing the building owner from acting on an invalid award). The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

8 Party Wall etc Act 1996 s 10(16).

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NOTE 3--An appeal under the 1996 Act s 10(17) is a statutory appeal governed by CPR Pt 52 (see CIVIL PROCEDURE vol 12 (2009) PARA 1658 et seq): *Zissis v Lukomski* [2006] EWCA Civ 341, [2006] 1 WLR 2778.

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/988. Expenses of work.

988. Expenses of work.

The expenses of work under the Party Wall etc Act 1996 are to be defrayed by the building owner[1], except where the Act otherwise provides[2]. Any dispute as to responsibility for expenses must be settled in accordance with the statutory dispute resolution procedure[3].

Where works are carried out, and some of the works are carried out at the request of the adjoining owner[4] or in pursuance of a requirement made by him, then the adjoining owner must defray the expenses of carrying out the works requested or required by him[5]. Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner, the adjoining owner must pay a due proportion of the expenses incurred by the building owner in carrying out that work[6].

Where consent in writing has been given to the construction of special foundations[7] on land of an adjoining owner, and the adjoining owner erects any building or structure and its cost is

found to be increased by reason of the existence of those foundations, the owner of the building to which the foundations belong must, on receiving an account with any necessary invoices and other supporting documents within the period of two months beginning with the day of the completion of the work by the adjoining owner, repay to the adjoining owner so much of the cost as is due to the existence of the foundations[8].

Where the building owner is required to make good damage under the Party Wall etc Act 1996, the adjoining owner has a right to require that the expenses of such making good be determined in accordance with the statutory dispute resolution procedure and paid to him in lieu of the carrying out of work to make the damage good[9].

An adjoining owner may serve a notice requiring the building owner, before he begins any work in the exercise of rights conferred by the Party Wall etc Act 1996, to give such security as may be agreed between the owners or in the event of dispute determined in accordance with the statutory dispute resolution procedure[10]. Where: (1) an adjoining owner serves such a notice on the building owner; or (2) in the exercise of rights conferred by the Act an adjoining owner requires the building owner to carry out any work the expenses of which are to be defrayed in whole or in part by the adjoining owner, the building owner may before beginning the work to which the notice or requirement relates serve a notice on the adjoining owner requiring him to give such security as may be agreed between the owners or in the event of dispute determined in accordance with the statutory dispute resolution procedure[11]. If, within the period of one month beginning with the day on which the building owner serves such a notice or, in the event of dispute, the date of the determination by the surveyor or surveyors[12], the adjoining owner does not comply with the notice or the determination, then the adjoining owner's notice or requirement[13] to which the building owner's notice relates ceases to have effect[14].

Within the period of two months[15] beginning with the day of the completion of any work executed by a building owner of which the expenses are to be wholly or partially defrayed by an adjoining owner[16] the building owner must serve on the adjoining owner an account in writing[17]. This account must show particulars and expenses of the work[18], and any deductions to which the adjoining owner or any other person is entitled in respect of old materials or otherwise[19]. In preparing the account the work must be estimated and valued at fair average rates and prices according to the nature of the work, the locality and the cost of labour and materials prevailing at the time when the work is executed[20]. Within the period of one month beginning with the day of service of the account, the adjoining owner may serve on the building owner a notice stating any objection he may have to the account and a dispute is then deemed to have arisen between the parties[21]. If within that one month period, the adjoining owner does not serve such a notice he is deemed to have no objection to the account[22].

All expenses to be defrayed by an adjoining owner in accordance with an account served as described above must be paid by the adjoining owner[23]. Until the adjoining owner pays these expenses to the building owner, the property in any works executed under the Party Wall etc Act 1996 to which the expenses relate is vested solely in the building owner[24].

The right to receive payment[25] after a sale or transfer by the building owner of his property vests in the transferee[26] but not apparently in any occupying tenant[27].

1 Party Wall etc Act 1996 s 11(1). For the meaning of 'building owner' see para 966 note 1 ante.

2 Exceptions occur, for example, where a new party wall is constructed by agreement (see ibid ss 1(3)(b), 11(3); and para 966 ante); where underpinning, etc is necessitated by a defect or want of repair and both owners make use of the wall (see ss 2(2)(a), 11(4); and para 980 ante); where work is carried out to repair or rebuild a party structure or party fence wall is necessitated by a defect or want of repair (see ss 2(2)(b), 11(5); and para 980 ante); and where the building owner wishes to reduce the height of a wall and the adjoining owner serves a counter notice requiring the existing height to be maintained (see ss 2(2)(m), 11(7); and para 980 ante).

3 Ibid s 11(2). As to the resolution of disputes see paras 985-987 ante.

4 For the meaning of 'adjoining owner' see para 966 note 5 ante.

5 Party Wall etc Act 1996 s 11(9). This would appear to include both informal requests and requirements made by written counter notice. The adjoining owner does not have to pay for underpinning which he has required by virtue of s 6(3): see para 982 ante.

6 Ibid s 11(11). For this purpose, the building owner is taken to have incurred expenses calculated by reference to what the cost of the work would be if it were carried out at the time when the subsequent use is made: s 11(11). Cf *Re an Arbitration between Stone and Hastie* [1903] 2 KB 463, CA (an adjoining owner who later made use of a raised party wall did not have to pay a contribution to a lessee of the building owner when it was the building owner who had incurred the expense of raising the wall). This case was decided in relation to earlier similar legislation (see para 961 ante).

7 For the meaning of 'special foundations' see para 966 note 15 ante.

8 Party Wall etc Act 1996 s 11(10). As to the implications of this provision for the enforcement of obligations against successors in title see the text and notes 25-27 infra.

9 Ibid s 11(8). See also para 983 ante.

10 Ibid s 12(1).

11 Ibid s 12(2).

12 As to the determination of disputes see paras 985-987 ante. For the meaning of 'surveyor' see para 985 note 4 ante.

13 Ie the notice mentioned in head (1) in the text or the requirement mentioned in head (2) in the text.

14 Party Wall etc Act 1996 s 12(3).

15 See *Spiers & Son Ltd v Troup* (1915) 84 LJKB 1986 (where it was held that the time limit was not merely directory but that time was of the essence and a claim for contribution could not be made if the account was served late). This case was decided in relation to earlier similar legislation (see para 961 ante).

16 Ie in accordance with the Party Wall etc Act 1996 s 11: see the text and notes 1-9 supra. See also paras 980-981, 983 ante.

17 Ibid s 13(1).

18 Ibid s 13(1)(a).

19 Ibid s 13(1)(b).

20 Ibid s 13(1).

21 Ibid s 13(2).

22 Ibid s 13(3).

23 Ibid s 14(1).

24 Ibid s 14(2). Since this provision is a security for payment of the amount due under the account which has been served, it would appear to be a form of charge over land which ceases on payment of the account: see *Mason v Fulham Corpn* [1910] 1 KB 631. This case was decided in relation to earlier similar legislation (see para 961 ante).

25 Such a right may arise, for example, under the Party Wall etc Act 1996 s 1(3)(b) (allocation of expenses of building a new party wall on the line of junction to be defrayed from time to time in proportion to use: see para 966 ante), s 11(10) (contribution to be made by a building owner where special foundations later increases the cost of development by an adjoining owner: see the text and note 8 supra), and s 11(11) (adjoining owner later making use of works paid for by a building owner: see the text and note 6 supra).

26 See *Mason v Fulham Corpn* [1910] 1 KB 631. The service of a notice under the Party Wall etc Act 1996 or the existence of an award are, if material to the transaction, facts which should be disclosed to an intending purchaser: see *Carlish v Salt* [1906] 1 Ch 335. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante).

27 See *Re an Arbitration between Stone and Hastie* [1903] 2 KB 463, CA. This case was decided in relation to earlier similar legislation (see para 961 ante).

Halsbury's Laws of England/BOUNDARIES (VOLUME 4(1) (2002 REISSUE))/4. PARTY WALLS/(4) RIGHTS AND DUTIES ARISING BY VIRTUE OF THE PARTY WALL ETC ACT 1996/989. Service of notices.

989. Service of notices.

A notice or other document required or authorised to be served[1] under the Party Wall etc Act 1996 may be served on a person either by delivering it to him in person or by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom[2]. In the case of a body corporate, a notice or other document may be served by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office[3].

In the case of a notice or other document required or authorised to be served on a person as owner of premises, it may alternatively be served by addressing it 'the owner' of the premises (naming them), and delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises[4].

A notice served on behalf of only one of two or more joint tenants is not served by the building owner and is invalid[5].

1 The Party Wall etc Act 1996 does not prescribe any form of notice but the context makes clear that the notices must be in writing. The validity of any notice will be decided in the light of the principles established in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL (notice determining a lease), where it was held that a notice could be effective despite a minor error, provided that it would unambiguously inform a reasonable recipient how and when it was to operate).

2 Party Wall etc Act 1996 s 15(1)(a), (b).

3 Ibid s 15(1)(c).

4 Ibid s 15(2).

5 See *Lehmann v Herman* [1993] 1 EGLR 172 (where a husband and wife were joint tenants both together constituted the building owner). It may, however, be sufficient to serve one of two or more joint adjoining owners: see *Crosby v Alhambra Co Ltd* [1907] 1 Ch 295. The cases cited supra were decided in relation to earlier similar legislation (see para 961 ante). For the meaning of 'building owner' see para 966 note 1 ante; and for the meaning of 'adjoining owner' see para 966 note 5 ante.

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989 Service of notices

NOTE 1--See *Roadrunner Properties Ltd v Dean* [2003] EWCA Civ 1816, [2004] 11 EG 140 (failure to serve notice should not allow owner to obtain forensic advantage).